Petition

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81-2026

No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNCLE BEN'S, INC.,

Petitioner,

v.

THOMAS JOHNSON, Individually, and on Behalf of all Others Similarly Situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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STATEMENT REQUIRED BY RULE 28:1

Pursuant to Rule 28:1 of the Rules of the United States Supreme Court, Petitioner, Uncle Ben's, Inc., hereby advises that it is a wholly owned subsidiary of Mars, Incorporated. Other Mars, Incorporated subsidiaries and affiliates are:

M & M Mars, Inc.
Snackmaster, a Division of M & M Mars, Inc
Mars Money Systems, a Division of M & M Mars, Inc.
Kal Kan Foods, Inc.
Uncle Ben's Foods, a Division of Uncle Ben's, Inc.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the disparate impact theory of employment discrimination is (a) applicable to claims of classwide discrimination based on generalized-nonspecified employment practices or alleged subjective criteria or (b) limited to challenges to specifically elucidated objective, facially neutral practices, such as tests or physical requirements?

2. Whether the Court below erred (a) in holding the United States Supreme Court's decision in *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981), that the burden of persuasion remains at all times with the plaintiff, inapplicable to a disparate impact case and (b) in requiring the defendant to "prove" legitimate, nondiscriminatory reasons by a preponderance of the evidence?

3. Whether the Court below erred in concluding that the burden of proof shifts if a plaintiff does no more than produce general evidence of a higher percentage of blacks in the lower levels of a defendant's workforce than in the higher levels, without specific statistical proof of "gross" disparity between persons qualified for promotion and those promoted during the relevant time frame?

4. Whether the Court below erred in holding that comparisons of a defendant's workforce to the external labor market are irrelevant in determining whether the defendant discriminates against blacks with respect to promotions?

5. Whether the Court below erred in holding that the District Court adopted and applied an erroneous notion of controlling legal principles regarding the use and role of statistics in an employment discrimination case?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Uncle Ben's, Inc. respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in *Johnson* v. *Uncle Ben's, Inc.*, 657 F.2d 750, entered on September 30, 1981.

OPINIONS BELOW

The opinion of the District Court is reported at 71 F.R.D. 19 (S.D. Tex. 1978), and is reprinted in the separate Appendix hereto as App. E. The first opinion of the Court of Appeals is reported at 615 F.2d 915 (5th Cir. 1980), and is reprinted as App. D. The opinion of the Court of Appeals on petition for rehearing is reported at 628 F.2d 419 (5th Cir. 1980), and is reprinted as App. C. This Court's Order granting Uncle Ben's, Inc.'s Petition for a Writ of Certiorari, vacating the Court of Appeals' decision, and remanding the case to the Court of Appeals is reported at 451 U.S. 902 (1981), and is reprinted as App. B. The opinion of the Court of Appeals on remand is reported at 657 F.2d 750 (5th Cir. 1981), and is reprinted as App. A.

JURISDICTION

The judgment sought to be reviewed was dated and entered on September 30, 1981. Uncle Ben's, Inc.'s Suggestion of Rehearing En Banc was denied by Order dated December 30, 1981 (App. F). On March 24, 1982, this Court granted Uncle Ben's, Inc.'s request for an extension of time for filing the instant Petition, to and including April 30, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

STATUTES INVOLVED

Title VII of the Civil Rights Act of 1964, as amended (hereinafter "Title VII"), 42 U.S.C. § 2000e, *et seq.* (1976), and 42 U.S.C. § 1981 (1976) (App. G).

STATEMENT OF THE CASE

A. PROCEDURAL OVERVIEW

Thomas Johnson (hereinafter "Plaintiff") brought this class action alleging Uncle Ben's, Inc. (hereinafter "Uncle Ben's" or "Defendant") discriminated against him and similarly situated blacks and Mexican-Americans in violation of 42 U.S.C. § 1931 and Title VII. Plaintiff's allegations were limited to the period commencing March 28, 1972, and charged a general pattern or practice of discrimination.

At the end of Plaintiff's direct case, Defendant's motion for dismissal was granted as to all issues except discrimination in promotion of blacks.[1] In rebuttal, Defendant called its personnel manager and three experts. At the conclusion of Plaintiff's direct examination of his expert rebuttal witness, the District Court ruled for Defendant from the bench and entered detailed Findings of Fact and Conclusions of Law.

The Fifth Circuit affirmed *per curiam* on April 11, 1980. On October 17, 1980, the Fifth Circuit granted Plaintiff's Petition

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[1] As phrased by Plaintiff's expert, the issue was actually one of "upward mobility," defined by Plaintiff's expert as the monetary advancement of incumbent employees over time. Throughout the prior proceedings, "promotion" and "upward mobility" were used interchangeably. Obviously, they are not the same. Promotions are only one factor in "upward mobility."

for Rehearing, modified and affirmed in part, reversed in part, and remanded.

On April 20, 1981, this Court granted Uncle Ben's Petition for a Writ of Certiorari, vacated the Fifth Circuit's decision, and remanded the case in light of *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981).

On remand, the Fifth Circuit ignored the Supreme Court's direction, with Judge Thomas dissenting, held *Burdine* inapplicable, and remanded the case to the District Court in accordance with its prior opinion on petition for rehearing.

B. THE PROCEEDINGS BEFORE THE DISTRICT COURT

Plaintiff's Complaint alleged that Defendant maintained "policies, practices, customs or usage of . . . *discriminating . . . because of race . . .*" (emphasis supplied). The parties' joint pretrial order defined Plaintiff's claims as whether Defendant maintained "policies, practices, customs, or usages which result in *discriminatory treatment*" of blacks (emphasis supplied).

Plaintiff's statistical proof in his direct case focused on the existence of an alleged pattern of disparity with respect to "upward mobility" of black employees. Testimony and statistical analysis were limited to upward mobility as a function of salary increases. Plaintiff's expert based his conclusions on Table III of Plaintiff's Exhibit 8, primarily Table III.3, his only analysis restricted to the relevant time frame. Table III.3 purported to assess the 1971-1974 "upward mobility" of blacks and whites *employed both dates* and encompassed only comparisons of *average wage increases*. Plaintiff's expert relied on Table III.3 to assert that blacks in lower income groups had not progressed forward as rapidly as whites.

Cross examination and the testimony of Dr. Roy Gilbert disclosed that Table III.3 was inaccurate in virtually every respect.

When corrected, Plaintiff's statistics failed to establish a discriminatory pattern favoring whites. Rather, the statistics established a pattern of upward mobility which overall, *favored blacks* with significantly greater wage increases.[2]

Defendant's expert proof was introduced through Dr. Richard Jeanneret, Dr. Gilbert, and Dr. Gordon Otto.

Dr. Otto *examined all promotions that occurred at Uncle Ben's from 1970-1974*. He concluded that no statistically significant differences existed in the advancement of blacks and whites in (a) the number of promotions, (b) time in grade prior to promotion, and (c) wage increases received upon promotion.

Dr. Jeanneret analyzed Defendant's job descriptions in accordance with EEOC and professional guidelines and accurately placed Uncle Ben's jobs in 1970 census occupational categories. He established that a great many jobs at Uncle Ben's require knowledge or skills not obtainable through on-the-job or internal training or experience.[3]

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[2] Whereas Plaintiff's expert claimed that the "all" employee category included 174 white and 102 black employees (Plaintiff's Ex. 8, Table III.3), there were actually 191 white and 127 black employees (Defendant's Ex. 31). Instead of the 20% white and 22% black average wage increases shown on Table III.3, whites actually received only 17.97% on the average while blacks received 23.01%. The percentage difference *favoring* blacks was statistically significant at the 5% level. In fact, the difference was highly significant, amounting to 5 standard deviations. Comparable errors in Plaintiff's expert's analyses exist with respect to the employee group of "all except managers and officials"; although the difference is no longer statistically significant, the average wage increase received by blacks during the subject time period exceeded by 1.26% that received by whites. These analyses were limited to employees employed throughout the relevant time frame. *See generally* Finding of Fact No. 12 (App. E-5).

In terms of the wage level groupings utilized by Plaintiff's expert, e.g., "at or below a given wage rate," Defendant's evidence established that the conclusion reached by Plaintiff's expert in each instance was erroneous and that as to these groups any black-white wage increase differences were not significant. Findings of Fact No. 12 (App. E-5).

[3] Dr. Jeanneret listed numerous positions both in the plant and office that require certain knowledge, ability, and/or skills that cannot be obtained merely by working at Uncle Ben's.

Because many jobs require knowledge or skills not obtainable at Uncle Ben's, Dr. Gilbert, using the job to census category correlations and the 1970 census, computed the proportionate availability of whites and blacks for the jobs at Uncle Ben's. He then compared the actual number of employees in Uncle Ben's job zones with this expected number and concluded that the employment pattern at Uncle Ben's was consistent with external availability.[4]

Defendant's personnel director presented evidence of the upward mobility of individual black employees who Plaintiff claimed had been relegated to lower level jobs.[5] The evidence established that any differences in black-white upward mobility were due not to race, but to specific (nondiscriminatory) individual attributes of the employees in question, e.g., lack of interest in changing jobs; failure to obtain outside training and requisite skills; limited ability to read, write and make numerical calculations; promotion refusals; non-shift work requests; and performance shortcomings. Plaintiff offered no evidence that the reasons given were pretextual.

C. THE DISTRICT COURT'S OPINION

The District Court entered detailed Findings of Fact examining the extensive statistical analyses conducted by both Plaintiff's and Defendant's expert witnesses (App. E).

The Court rejected the conclusion drawn by Plaintiff's expert from his "upward mobility" analysis of average wage increases that blacks in lower income groups had not progressed forward as rapidly as whites. In fact, the Court found that overall blacks

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[4] In contrast to the testimony of Dr. Jeanneret and Dr. Gilbert as to qualification requirements and availability limitations, no evidence was presented by Plaintiff regarding the existence of qualified personnel within Defendant's workforce.

[5] The black employees identified by Defendant were in response to Plaintiff's statistical analyses, which focused on blacks on the payroll as of May 1974 who were hired prior to 1965 or 1960. Also, Table V of Plaintiff's Exhibit 8 identified specific employees who Plaintiff's expert claimed were illustrative of Plaintiff's theory that blacks in lower job zones did not advance, in terms of wage increases, as fast as whites.

"received a statistically significant greater wage increase than . . . white[s]."[6]

The District Court found that Plaintiff's statistical analysis of wage increases received by Defendant's black and white employees failed to "establish *discriminatory treatment* of Defendant's black employees." Finding of Fact No. 11 (App. E-4) (emphasis supplied). The Court further found that any claimed differences in upward mobility as between black and white employees were due to specific (nondiscriminatory) individual attributes of Defendant's employees, not to race. *See* Finding of Fact No. 13 (App. E-5).

With respect to Dr. Otto's analysis of all promotions during 1970-74, the District Court found that in terms of (a) the number of employees promoted, (b) their time in grade prior to promotion, and (c) wage increases received upon being promoted, "there has been no statistically significant difference in the *treatment* of Defendant's black and white employees." Finding of Fact No. 19 (App. E-6) (emphasis supplied).

Based upon the foregoing, the District Court concluded that Uncle Ben's did not discriminate against Plaintiff and the class he represented "*on the basis of race*" with regard to promotions. Conclusion of Law No. 4 (App. E-6, 7) (emphasis supplied).

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[6] Specifically, the Court found:

> 12. During the period from August 8, 1971 through May 10, 1974, limiting the analysis to employees who were employed on both dates, Defendant's black employees received a statistically significant greater wage increase than did Defendant's white employees. See Defendant's Exhibit No. 31. Further, contrary to Table III.3 of Plaintiff's Exhibit No. 8, the Court finds that the percentage increase in black wages exceeded the percentage increase in white wages regardless of whether or not individuals in job classifications falling within EEOC category "Officials & Managers" are included. See Defendant's Exhibit No. 31. Utilizing salary level groupings suggested by Plaintiff's Exhibit No. 8, e.g., employees earning less than a given amount, any differences in black-white wage increases during the 1971-74 period were not statistically significant. See Defendant's Exhibit No. 57.

(App. E-4, 5).

The District Court incorporated into its detailed findings the following remarks made from the bench:

> *First*, on statistics. *If* we accept the Plaintiff's side of the case, all that the experts say, the way I see it, is that what has transpired in the real world at Uncle Ben's could not have statistically happened by chance.[7] We are not here to enforce a law which says that things must occur within the limits of mathematical probability. The law says the Defendant may not discriminate on the basis of race. The law does not say that the Defendant shall not violate the rules of mathematical probability.
>
> A business such as the Defendant's cannot be run successfully by chance. Decisions as to who may best serve in any given job must be made rationally by persons with sufficient knowledge of the individuals and the jobs involved to make such decisions.
>
> *Second*, having had the opportunity both to see and hear all the witnesses in this case, I have concluded that any discrimination at Uncle Ben's has been color blind. In this case it has been between individuals without reference to race or other impermissible criterion.

(App. E-2) (emphasis supplied).

D. THE COURT OF APPEALS' INITIAL DECISIONS

Initially, the Fifth Circuit affirmed *per curiam* (App. D). On rehearing, the Fifth Circuit reversed the District Court's decision in part and remanded. The Court premised that reversal on its conclusion that the District Court's statement "the law does not say that the Defendant shall not violate the rules of mathematical probability"[8] is an incorrect assessment of the role of statistics in a Title VII case (App. C-6). Noting that the "clearly erroneous" standard of Rule 52(a) does not apply to

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[7] Significantly, the District Court's statement speaks in terms of "*if* we accept the Plaintiff's side of the case . . . ," not that the District Court *did* accept Plaintiff's side. Obviously, the District Court did not. *See generally* Finding of Fact Nos. 10-19 (App. E).

[8] Through the use of italics, it is clear that this statement was specifically viewed by the Fifth Circuit as the basis for concluding the District Court applied an erroneous notion of controlling legal principles regarding the use of statistics (App. C-5).

findings of fact made under an erroneous notion of controlling legal principles, the Court purportedly undertook an independent analysis of the record (App. C-6, 7).

The Fifth Circuit did not set aside any of the detailed Findings of the District Court. Instead, the panel focused on what it perceived as omissions from those findings, observing that the District Judge "frankly ignored deciding the questions of whether any promotion or upward mobility occurs at Uncle Ben's, and, if so, whether blacks suffer a disparate impact in seeking promotions" (App. C-14).[9] Accordingly, the Court remanded the case to the District Court to enter new findings.

> First, the new findings must determine the number of Uncle Ben's jobs that were filled by promotion. . . . Second, the District Court must decide whether Uncle Ben's has rebutted or discredited plaintiffs' prima facie showing that in promotions blacks are relegated to lower level jobs and are promoted at a significantly slower rate than whites. On this question, statistics comparing Uncle Ben's work force to the external labor market are irrelevant. Third, the District Court also must find whether the legitimate nondiscriminatory reasons that it credited, based on a correct view of the controlling legal principles on that point, apply to any of the promotion positions and not just to the lateral hire positions.

(App. C-15) On the latter point, the Fifth Circuit held in accordance with its decision in *Burdine* v. *Texas Department of Community Affairs*, 608 F.2d 563 (5th Cir. 1979), *vacated and remanded*, 450 U.S. 248 (1981), that Uncle Ben's was required

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[9] In the Fifth Circuit's view, the District Court based its conclusion that Uncle Ben's had not violated Title VII on favorable statistics comparing Uncle Ben's work force at various levels with similar Houston SMSA job levels (App. C-13). The Fifth Circuit obviously overlooked Dr. Otto's testimony and analyses and Finding of Fact No. 19, wherein the District Court found that in terms of (a) the number of employees promoted, (b) their time in grade prior to promotion, and (c) the wage increases received upon being promoted, "there has been no statistically significant difference in the treatment of Defendant's black and white employees" (App. E-6).

to prove the existence of legitimate, nondiscriminatory reasons by a preponderance of the evidence (App. C-10, 11).[10]

E. THE UNITED STATES SUPREME COURT'S DISPOSITION OF UNCLE BEN'S PETITION FOR A WRIT OF CERTIORARI

On April 20, 1981, this Court granted Uncle Ben's Petition for a Writ of Certiorari, vacated the Fifth Circuit's decision, and remanded the case in light of *Burdine* (App. B-1).

F. THE COURT OF APPEALS' DECISION ON REMAND

On remand, the Fifth Circuit, without explanation or analysis, declared that "the present case involves charges of disparate impact . . ." and that "the burdens of plaintiffs and defendant are thus unaffected by *Burdine*" (App. A-7). Ignoring Supreme Court direction, the Fifth Circuit reaffirmed its prior holding that Defendant was required to prove the existence of legitimate reasons by a preponderance of the evidence and remanded the case to the District Court in accordance with its prior opinion (App. A-7).

District Judge Thomas dissented from the majority opinion, observing that in referring the Fifth Circuit to *Burdine*, the Supreme Court did not wish the Fifth Circuit to distinguish disparate impact and discriminatory treatment cases and that the burden of persuasion in all cases remains with the plaintiff (App. A-8, 9).

REASONS FOR GRANTING THE WRIT

I. THE FIFTH CIRCUIT'S TREATMENT OF THIS CASE AS ONE OF DISPARATE IMPACT IS CONTRARY TO *FURNCO CONSTRUCTION CO.* v. *WATERS*, *HAZELWOOD SCHOOL DISTRICT* v. *UNITED STATES*, *TEAMSTERS* v. *UNITED STATES* AND DECISIONS IN OTHER CIRCUITS

[10] In its decision, the Fifth Circuit specifically recognized that "plaintiffs did not introduce evidence that [Defendant's] explanations were pretextual" (App. C-11).

A. There Can Be No Question That The Instant Case Was Brought, Tried, And Decided By The District Court With The Consent Of Both Parties Under A Discriminatory Treatment Theory.

Plaintiff's Complaint charged a general pattern or practice of discrimination "against blacks . . . *because of their race.*" The parties' joint pre-trial order defined Plaintiff's claims as claims of "*discriminatory treatment.*"

Although Plaintiff generally claimed that blacks suffered limited "upward mobility," such limitations were not ascribed to any particular employment practice of Defendant, much less to any facially neutral, objective employment practice.[11] Plaintiff simply contended that blacks suffered limited "upward mobility" *because of their race* and attempted to establish a pattern of disparity through statistical analysis. No effort was made to correlate such analysis with any employment standard or requirement, much less to prove a causal connection between any such standard or requirement and the alleged disparities. Plaintiff argued on appeal that supervisors making promotional decisions were unfettered in the use of subjective factors, allowing them to *base their decisions on race.*

The District Court's Findings of Fact and Conclusions of Law demonstrate that the District Court analyzed the case under the discriminatory treatment theory. The District Court rejected the conclusion drawn by Plaintiff's expert from his "upward mobility" analysis that blacks in lower income groups had not

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[11] On appeal, Plaintiff for the first time argued that Defendant has "educational requirements" that operate to exclude minorities, citing the testimony of *Defendant's expert*, Dr. Jeanneret. This argument and the Fifth Circuit's statements regarding this matter (App. C-17), are totally inaccurate. Dr. Jeanneret explicitly testified that Uncle Ben's *does not* require specific degrees or educational levels. Obviously, since Plaintiff produced no evidence at trial that Uncle Ben's has "educational requirements," no effort was made to correlate alleged disparities in "upward mobility" with any "educational requirements."

progressed forward as rapidly as whites and found that Plaintiff's statistical analysis failed to "establish *discriminatory treatment* of Defendant's black employees" (App. E-4) (emphasis supplied). The District Court determined that any claimed differences in "upward mobility" were due to specific individual attributes of Defendant's employees — i.e., *legitimate nondiscriminatory reasons* — not to race (App. E-5) (emphasis supplied). With respect to Defendant's analysis of *all* promotions that occurred at Uncle Ben's during the relevant time frame, the District Court found "there has been no statistically significant difference in the *treatment* of Defendant's black and white employees" (App. E-6) (emphasis supplied).

The District Court's remarks likewise reflect its analysis of this case under the discriminatory treatment theory.

> We are not here to enforce a law which says that things must occur within the limits of mathematical probability. The law says the Defendant may not discriminate *on the basis of race*. The law does not say that the Defendant shall not violate the rules of mathematical probability.

(App. E-2) (emphasis supplied).

The Fifth Circuit's decision on rehearing held the statement "the law does not say the Defendant shall not violate the rules of mathematical probability" to be an incorrect legal standard.[12] The Court, however, did not explain why it judged the statement to be incorrect or articulate under which theory of discrimination — disparate impact or discriminatory treatment — it analyzed the instant case.[13]

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[12] *See* Note 8, *supra*.

[13] Indeed, as the Fifth Circuit recognized in its decision on remand from this Court, it made reference to the standards utilized in *both* disparate impact and discriminatory treatment cases (App. A-7). Although the Fifth Circuit asserts in its decision on remand that its reference to the standards of rebuttal in discriminatory treatment cases — i.e., its direction to the District Court to determine whether Uncle Ben's *proved* the legitimate, nondiscriminatory reasons profferred by a preponderance of evidence — was "not essential to its decision," this Court obviously would disagree since it remanded the case to the Fifth Circuit in light of its decision in *Burdine*, which overruled the Fifth Circuit's holding that a defendant must prove

The Fifth Circuit's decision on remand explicitly states that the Court, albeit erroneously, views the instant case as one of disparate impact.[14]

The Fifth Circuit apparently assumes that classwide claims automatically raise the issue of disparate impact irrespective of whether such claims allege discrimination as the result of facially neutral, objective employment standards.

B. *Furnco, Teamsters,* And *Hazelwood* Establish That A Case Like The Instant Case, Which Does Not Attack A Specific Objective Employment Practice, Such As Test Or Physical Requirement, Necessarily Presents Allegations Of Discriminatory Treatment.

The classic form of the disparate impact case, and indeed, the factual context of every case in which the Supreme Court has approved application of the theory, is an attack on a specific objective employment practice, such as a written scored test, or a specific objective requirement, such as a high school diploma or height and weight requirement.[15] This Court's decisions in

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the existence of legitimate nondiscriminatory reasons by a preponderance of the evidence. In fact, this issue is critical to the disposition of this case. Properly characterized, this is a discriminatory treatment case as to which Defendant articulated legitimate, nondiscriminatory reasons for the employment decisions in question. Recognizing, as the Fifth Circuit did, the total absence of any evidence that Defendant's reasons are or were pretextual, any *prima facie* case arguably made by Plaintiff has been successfully rebutted and the inquiry is ended.

[14] The Fifth Circuit's belief that this is a case of disparate impact explains why the Fifth Circuit in its decision on rehearing (App. C-1) held the District Court's statement to represent an incorrect legal standard. Specifically, the Fifth Circuit interpreted the District Court's statement as requiring a Plaintiff in a disparate impact case to prove discriminatory intent. This was not made clear in the decision on rehearing due to the Circuit's intermingling of impact and treatment principles and its failure to identify its theory of analysis. Of course, since the instant case was brought, tried, and properly decided on a *discriminatory treatment* theory, proof of discriminatory intent was necessary. *Teamsters,* 341 U.S. at 335. Thus, if the District Court's statement is to be read as requiring proof of discriminatory intent, such statement is absolutely correct.

[15] *See New York City Transit Authority* v. *Beazer,* 440 U.S. 568

Furnco, Hazlewood, and *Teamsters* make clear that the disparate impact theory is not an appropriate model for the analysis of cases challenging general employment policies or practices or alleged subjective criteria. *Furnco Construction Corp.* v. *Waters,* 438 U.S. 567 (1978); *Hazelwood School District* v. *United States,* 433 U.S. 299 (1977); *International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324 (1977).

In *Furnco,* three blacks challenged the *subjective* practice of only hiring persons known to be "experienced" and "competent." The Seventh Circuit, in assessing the applicability of disparate impact principles to these claims, stated: "This is not a case, like *Griggs* of comparing applicants by *objective but irrelevant standards,* and rejecting more blacks disproportionately than whites." *Waters* v. *Furnco Construction Corp.,* 551 F.2d 1085, 1089-90 (7th Cir. 1977) (emphasis added). Agreeing that the case properly should be analyzed under the discriminatory treatment rational of *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973), this Court distinguished cases such as *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971), and *Dothard* v. *Rawlinson,* 433 U.S. 321 (1977), which involved *objective,* but irrelevant selection criteria, e.g., tests and height requirements. *Furnco,* 438 U.S. at 575 n. 7. *Furnco* thus expressly recognizes that the disparate impact theory is limited to facially neutral, "objective but irrelevant" practices.

To the extent Plaintiff complains of decision makers' use of subjective factors, Plaintiff's claims are indistinguishable from the claims in *Furnco.* The fact that this case involves a class of black employees, instead of three black employees, is immaterial.

Analytically, the instant case is indistinguishable from the pattern and practice allegations in *Hazelwood School District* v.

(1979) (refusal to employ persons on methadone drug treatment program); *Dothard* v. *Rawlinson,* 433 U.S. 321 (1977) (height and weight requirement); *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975) (scored test and written test); *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971) (written test and high school diploma requirement).

United States, supra. Hazelwood involved "relatively unstructured procedures in the hiring of teachers." 433 U.S. at 301. "The only guidance given to principals was to hire the 'most competent' person available." 433 U.S. at 302. The plaintiff introduced evidence of statistical disparities and specific instances of discrimination. This Court determined that the "government's theory of discrimination was simply that the [employer] ... regularly and purposefully treated Negroes ...less favorably than whites," and thus required proof of intentional discrimination. 433 U.S. at 306 n. 12. *Hazelwood*, which even the Fifth Circuit has recognized as a *discriminatory treatment* class action, *Wilkins* v. *University of Houston*, 654 F.2d 388, 395 (5th Cir. 1981), makes clear that complaints of *subjective* criteria do not give rise to a case of disparate impact simply because statistical disparities are offered as evidence that blacks are *treated* less favorably than whites.

The "key" to a disparate impact case is the identification of *objective* criteria. Objective employment practices, such as tests, apply equally to all, but may operate to exclude minorities. A challenge to objective criteria complains of the criteria themselves. In contrast, a challenge involving subjective criteria complains not of the criteria *per se*, but that the decision maker applies the criteria discriminatorily. Such complaints are clearly complaints of overt discrimination — discriminatory treatment.

The gravamen of Plaintiff's complaint in the instant case is that Defendant engaged in "policies, practices, customs or usage" — a "pattern or practice" — of discriminating against protected group members "because of their race." While Plaintiff endeavored to establish statistical disparities, such disparities were proffered as evidence that Defendant treated blacks less favorably than whites. No alleged disparities were claimed to result from any identified facially neutral, *objective* employment standards.

To this extent, the foregoing allegations are indistinguishable from the pattern and practice allegations in *Teamsters*. In both cases, it was alleged that the employer failed to treat minorities

on an equal basis with whites. Expressly recognizing that such allegations fall under the "disparate [discriminatory] treatment" theory, 431 U.S. at 335 n. 15, this Court determined that "the ultimate factual issues are thus simply whether there was a pattern or practice of disparate treatment and, if so, whether the differences were racially premised." 431 U.S. at 335, *quoting McDonnell Douglas*, 411 U.S. at 805 n. 18. In the instant case, even if the alleged pattern of differences in treatment is established, it remains Plaintiff's burden under *Teamsters* to prove such differences were "racially premised."

The Fifth Circuit's mischaracterization of the instant case as one of disparate impact apparently results from its confusion of *evidence* of statistical disparities with the "disparate impact" theory. Statistical disparities, however, do not equate with "disparate impact." While overt discrimination, i.e., discriminatory treatment, can result in statistical disparities, the fact that such disparities exist will not convert a case of discriminatory treatment into a case of disparate impact.

C. The Fifth Circuit's Treatment Of This Case As One Of Disparate Impact Is Contrary To Decisions In Other Circuits.

The Eighth, Ninth, Third, and Second Circuits have recognized the limits on the disparate impact theory. Consistent with this Court's precedent, these circuits properly have applied the discriminatory treatment theory to classwide "pattern or practice" allegations or challenges to alleged subjective criteria.

In *Taylor* v. *Teletype Corp.*, 648 F.2d 1129 (8th Cir. 1981), plaintiffs presented statistical analyses purporting to establish that blacks were demoted at a significantly greater rate than whites. 648 F.2d at 1133. Plaintiffs did not identify any objective, facially neutral employment practice alleged to result in disproportionate demotions of blacks. Rather, the evidence established that employees were selected for demotion by reference to *subjective* factors, such as "conduct" and "ability . . . to get along with others." 648 F.2d at 1135.

The Eighth Circuit correctly determined that the claims should be analyzed under the discriminatory treatment theory,

recognizing, as did *Furnco, supra,* that the disparate impact theory is limited to objective, facially neutral employment standards.

> A *Griggs*-type case challenges facially neutral standards that affect employees in a significantly discriminatory pattern. *See, e.g., Dothard* v. *Rawlinson,* 433 U.S. 321, 329 ... (1977) (height and weight requirements); *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 425 ... (1975) (standardized tests); *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 431 ... (1971) (high school diploma and standardized test). Here, plaintiffs do not challenge *objective* criteria; rather, they allege improper use of *subjective* procedures for demotions.

648 F.2d at 1132-33 n. 6.

The Ninth Circuit in *Heagney* v. *University of Washington,* 642 F.2d 1157 (9th Cir. 1981), also limited the disparate impact theory to challenges to identifiable, objective employment standards. *Heagney* involved a plaintiff's claim that the university defendant paid her at an unfairly low rate because of her sex. 642 F.2d at 1157-58. Plaintiff sought to prove her case under the disparate impact theory, alleging that the university's system of categorizing employees as "exempt" constituted a neutral employment practice which produced a disparate impact upon the salaries of females. 642 F.2d at 1163.

The Ninth Circuit rejected plaintiff's characterization of her claim as one of disparate impact.

> It is apparent, however, that the creation of jobs that are exempt ... cannot be equated with such well-defined *objective* employment practices such as personnel tests or minimal physical requirements. Classification of certain jobs as "exempt" only meant that the University had wider discretion to establish employee salaries ... The gravamen of [plaintiff's] complaint is that the lack of well-defined employment criteria allowed a pattern or practice of discrimination to exist. We therefore conclude that "impact" analysis is inappropriate and that [plaintiff] was required to prove disparate treatment.

642 F.2d at 1163 (emphasis supplied).

In *Croker* v. *Boeing Co.*, 662 F.2d 975 (3rd Cir. 1981), on the issue of promotions, plaintiff presented evidence of statistical disparities between the percentage of blacks in lower level jobs and the percentage in supervisory and lead positions. No attempt was made to correlate this analysis with any identifiable, objective employment standard. Plaintiff supported the statistical analysis with individual testimony and evidence that the promotion system was operated in a subjective fashion without written standards, thereby affording an opportunity to discriminate. 662 F.2d at 993-94.

The Third Circuit recognized the foregoing claim as one of discriminatory treatment. 662 F.2d at 993-95. It was further recognized that for analytical purposes, the promotion claim in *Croker* was indistinguishable from the pattern and practice allegations addressed in *Teamsters, supra.* 662 F.2d at 995.

In *Ste. Marie* v. *Eastern Railroad Association,* 650 F.2d 395 (2nd Cir. 1981), plaintiff alleged that her employer maintained "policies and practices" that discriminated against females with respect to promotions. *Ste. Marie* v. *Eastern Railroad Association,* 458 F.Supp. 1147, 1150 (S.D. N.Y. 1978). Through statistical analysis, plaintiff attempted to establish that the actual number of females in executive, managerial, and technical jobs was significantly less than the number to be expected based on total female workforce representation. 458 F.Supp. at 1156. Plaintiff did not identify any objective, facially neutral criteria alleged to limit the advancement of females. Plaintiff attempted to support her statistics with evidence that appointments to executive, managerial and technical positions were based upon "highly subjective" and "imprecise criteria," allowing discriminatory decision making. 458 F.Supp. at 1156.

The Second Circuit held the discriminatory treatment theory applicable to plaintiff's claim and rejected plaintiff's "belated attempt" to assert on appeal a disparate impact theory since the case was tried and decided, with plaintiff's consent, on a theory of discriminatory treatment. 650 F.2d at 399. [16]

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[16] The Court observed that " to hold a defendant to the more stringent

The holdings in the foregoing decisions that plaintiffs' claims constitute claims of *discriminatory treatment* cannot be reconciled with the Fifth Circuit's holding in the instant case that Plaintiff's action was one of *disparate impact*. Plaintiffs in each case essentially alleged that the defendants discriminated against protected group members *because of their race or sex*, i.e., that defendants engaged in "policies" or "practices" — a "pattern or practice" — of discrimination. While in each case the plaintiffs endeavored to establish statistical disparities, such disparities were proffered as evidence that the defendants *treated* blacks or females less favorably than whites or males. In none of the cases were any alleged statistical disparities claimed to result from any identifiable, facially neutral, *objective* employment standards. Indeed, the complaints involved the use of *subjective* criteria which allegedly allowed decision makers to *treat* blacks or females less favorably. Such complaints, as recognized by the Eighth, Ninth, Third, and Second Circuits are clearly complaints of overt discrimination — discriminatory treatment — and contrary to the Fifth Circuit's instant decision, cannot appropriately be analyzed under a disparate impact theory.

D. In A Decision Rendered Subsequent To, And In Direct Conflict With *Johnson* v. *Uncle Ben's*, A Fifth Circuit Panel Identified Limitations On Application Of The Disparate Impact Theory.

Ignoring the instant decision, a *different panel* of the Fifth Circuit in a *subsequent* opinion severely criticized efforts to force a discriminatory treatment case into a disparate impact model and thereby emphasized the judicial limitations on application of the disparate impact theory. *Pouncy* v. *Prudential*

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burden applicable in a disparate impact case at this date would be manifestly unfair." This observation is well taken in the instant case which was brought, tried, and decided by the District Court with the consent of both parties on a theory of discriminatory treatment. The Fifth Circuit should not be permitted to circumvent this Court's directions to reconsider its decision in light of *Burdine, supra*, by belatedly and erroneously declaring the case to be one of disparate impact to which *Burdine* does not apply.

Insurance Company of America, No. 80-1935 (5th Cir. February 22, 1982) (App. H). Consistent with Supreme Court precedent, the *Pouncy* panel held that the disparate impact theory "is not . . . the appropriate vehicle from which to launch a wide ranging attack on the cumulative effect of a company's employment practices" (App. H-11).

The *Pouncy* panel further recognized that a challenge to subjective employee evaluations is not "akin to the 'facially neutral employment practices' the disparate impact model was designed to test" (App. H-13). Finally, the panel concluded that Pouncy had not and could not establish the required "causal connection" between the challenged employment practice and the composition of Prudential's work force (App. H-13, 14).

Similarly, the subjectivity challenged in Uncle Ben's is not a proper subject for the disparate impact model. Furthermore, no "causal connection" between any employment practice and Uncle Ben's work force was even attempted to be shown.

This belated recognition by the *Pouncy* panel of the limited scope of the disparate impact theory provides no comfort to Uncle Ben's in the instant case.[17] *Pouncy* and *Uncle Ben's* represent diametrically opposed statements by the Fifth Circuit respecting the law in this area and generate an intollerable burden for the District Court on remand of *Uncle Ben's*. Likewise, the *Pouncy-Uncle Ben's* conflict poses a serious dilemma for other district courts and litigants within the Fifth Circuit who will be bound by both decisions, yet unable to reconcile them.

Moreover, if allowed to stand, the Fifth Circuit's decision in *Uncle Ben's* results in an *unfair* allocation of the burden of proof

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[17] Uncle Ben's Suggestion of Rehearing En Banc was filed and denied by the Fifth Circuit prior to the *Pouncy* panel's decision (App F, H). The Suggestion of Rehearing having been denied, Uncle Ben's has no further recourse in the Fifth Circuit by which to bring to its attention the conflict between *Uncle Ben's* and *Pouncy*.

on Defendant by compelling proof of a "legitimate business reason" for a practice or policy that has never been specified.[18]

The record squarely presents the question whether a case attacking general employment policies or alleged subjective criteria and not identifying specific, objective standards, such as tests or physical requirements, necessarily alleges individual instances of discriminatory treatment which must be analyzed as were *Teamsters, Furnco, Hazelwood* and the decisions of the Eighth, Ninth, Third, and Second Circuits, under a discriminatory treatment theory. This question as to which theory — discriminatory treatment or disparate impact — is to be applied to classwide claims attacking general employment policies or "excess subjectivity" is an important question in the adjudication of claims under Title VII, which is certain to recur in many contexts. The writ of certiorari should be granted so that this Court may authoritatively decide this question.

THE FIFTH CIRCUIT'S HOLDING THAT *BURDINE'S* ALLOCATION OF THE BURDENS OF PRODUCTION AND PERSUASION IS NOT APPLICABLE TO CASES OF DISPARATE IMPACT CONFLICTS WITH DECISIONS OF THE THIRD CIRCUIT.

A. This Case Is One Of Discriminatory Treatment, And The Applicability Of *Burdine* Is Beyond Question. However, Even If Statistical Evidence Of Generalized Allegations Of Discrimination Or Statistical Evidence Regarding Alleged Subjective Criteria Are To Be Analyzed Under The Disparate Impact Theory, *Burdine* Nevertheless Controls.

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[18] As noted in *Pouncy:*

> Proof that a specific practice results in a discriminatory impact on a class in an employer's work force [is required] in order to allocate fairly the parties' respective burdens of proof at trial . . . Identification by the aggrieved party of the specific employment practice responsible for the disparate impact is necessary so that the employer can respond by offering proof of its legitimacy . . . We do not permit a plaintiff to challenge an entire range of employment practices merely because the employer's work force reflects a racial imbalance that might be causally related to any one or more of several practices . . . (App. H-12).

In *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975), this Court held that when the plaintiff establishes a *prima facie* case under the disparate impact theory, the defendant must then produce evidence "that any *given requirement* has a *manifest relationship* to the employment in question." 422 U.S. at 425 (emphasis supplied). It then "remains open to the complaining party to show that other selection devices, without a similar undesirable effect, also would serve the legitimate interest." *Id.* Showing of other suitable devices "would be evidence that the employer was using the test as a 'pretext' for discrimination." *Id., citing McDonnell Douglas*, 411 U.S. at 804-05.

Where, as here, plaintiff fails to identify a facially neutral, objective standard or to correlate statistical evidence supportive of generalized allegations of discrimination with any standard, the defendant obviously cannot show the "manifest relationship" of a "given" standard to employment since no standard has been "given." Similarly, where statistics suggest discrimination through subjective or standardless systems permitting consideration of race, there exists no "given standard" for which a "manifest relationship" to employment can be shown. Under either case, the defendant has only two options: (1) to show the inaccuracy of plaintiff's statistics or (2) to offer legitimate, nondiscriminatory reasons to explain any statistical disparities. The latter alternative differs from an individual discriminatory treatment case *only* to the extent that, instead of offering legitimate, nondiscriminatory reasons for its actions with respect to one individual, the defendant offers legitimate, nondiscriminatory reasons with respect to the class encompassed within plaintiff's statistical analysis — that is, it refutes the inference of discrimination raised by the statistics. This distinction is merely one of numbers and is insufficient to alter the burden of proof allocation of *Burdine*. *Burdine* controls and it mandates that the defendant's burden is merely a burden of production and that the burden of persuasion remains at all times with the plaintiff. *Croker* v. *Boeing Co.*, 662 F.2d at 991.

B. As Recognized By The Third Circuit En Banc, *Burdine* Is Applicable To A "Classic" Disparate Impact Case Challenging A Specific, Objective, Neutrally Applied Employment Standard.

The Fifth Circuit's rationale for its holding that *Burdine*'s allocation of burdens of proof and production does not apply to disparate impact cases is based on its erroneous contention that a *prima facie* case of disparate impact is the equivalent of unlawful discrimination. The Fifth Circuit claims that while in a discriminatory treatment case "a prima facie case raises the inference of discrimination . . .," the plaintiff in a disparate impact case "must not merely prove circumstances raising an inference of discrimination, he must prove the *discriminatory* impact at issue" (App. A-6) (emphasis supplied). Based upon this perceived distinction between impact and treatment cases, the Fifth Circuit concluded that a *prima facie* case of disparate impact shifts the burden of persuasion to the defendant (App. A-6).

Contrary to the Fifth Circuit's assertion, and as explicitly recognized by the Third Circuit, en banc, the burden of persuasion remains at all times with the plaintiff. *Croker* v. *Boeing Co., supra*; *NAACP* v. *Medical Center, Inc.*, 657 F.2d 1322 (3rd Cir. 1981). The Third Circuit rejected plaintiff's contention that countering a *prima facie* case of discriminatory impact required the defendant to shoulder the burden of persuasion.

> [T]he plaintiffs here apparently assume that making out a prima facie case of disproportionate impact is the equivalent of establishing a Title VII violation by a preponderance of the evidence. This assumption cannot stand because the *Furnco* analysis should control impact, as well as intent, cases.
>
> * * *
>
> A showing of disproportionate effect or impact alone may not establish a violation. "The touchstone is business necessity. If an employment practice which operates to exclude . . . cannot be shown to be related to job performance, the practice is prohibited." *Id.* To be proscribed, then, the challenged practice must not only affect disproportionately, it must do so unnecessarily.

To establish a prima facie case the plaintiff need not show that the practice was unnecessary but may rely on inference. If the defendant presents no evidence of business relatedness in his case, the court may assume that there was no permissible reason for the impact. In the event that the defendant does come forward with evidence to meet the inference of discrimination raised by the prima facie case, the plaintiff may still carry his burden of persuasion by demonstrating that a feasible, yet less onerous alternative exists (citation omitted).[19]

The contention plaintiffs make here, that business relatedness constitutes an affirmative defense, is incompatible with the third step of *Albemarle*. Plaintiffs would have [defendant] bear the burden of persuasion on this issue by showing a dearth of less objectionable alternatives. But in *Albemarle*, this burden was imposed on the complaining party. As the [Supreme] Court explained in an analogous context, if the plaintiffs were correct in their assessment of the various burdens of production and persuasion, the third step in the analysis would be rendered "entirely superfluous . . . , since it would place on the defendant at the second stage the burden of showing that the reason . . . was not a pretext, rather than requiring such proof from the plaintiff as a part of the third step." *Board of Trustees of Keene State College* v. *Sweeney, supra*, at 24-25 n. 1.

The Supreme Court has not given any indication that it requires the shifting of the burden of persuasion in effects cases. To the contrary, the Court stated in *New York Transit Authority* v. *Beazer*, 440 U.S. 568, 587 n.31 . . . (1979), that the ultimate burden of proving discriminatory impact is the plaintiff's.

* * *

Moreover, it is illogical to impose a heavier burden on a defendant in a case where a neutral policy results in disparate impact than in one where the charge is unlawful animus. Indeed, if there is to be a difference, quite the opposite result should follow. The defendant who intentionally discriminates should not fare better than the one whose

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[19] Proof of feasible, yet less onerous, alternatives serves as evidence of "pretext." *Albemarle*, 422 U.S. at 425.

> conduct may be subjectively blameless, but because of its effects may require remedial action.

657 F.2d at 1334-1335.

The Fifth Circuit's holding that the "burden of persuasion [shifts] to the defendant in disparate impact cases" (App. A-6) would require Uncle Ben's to *prove* "legitimate, nondiscriminatory reasons for [its employment decisions] by a preponderance of the evidence" (App. C-10, 11), and in the process compel Defendant to prove the absence of pretext. The panel majority would have Uncle Ben's carry the burden of persuasion on the "manifest relationship" issue — in effect, compelling Uncle Ben's to prove the absence of or the "dearth of less objectionable alternatives." *NAACP* v. *Medical Center, Inc.*, 657 F.2d at 1335. The Fifth Circuit's holding thus would render the third step in *Albemarle* "entirely superfluous." *Id.*

The ultimate burden of persuasion on the issue of illegal discrimination at all times remains with the plaintiff without regard to whether cases founded on statistical evidence of generalized allegations of discrimination or statistical evidence regarding alleged subjectivity are to be analyzed under the disparate impact or discriminatory treatment theory. Whatever doubt may have existed on that score has been resolved by *Burdine*, yet ignored by the Fifth Circuit in the instant case.

THE FIFTH CIRCUIT'S CONCLUSION THAT THE BURDEN WOULD SHIFT TO THE DEFENDANT IF PLAINTIFF DOES NO MORE THAN PRODUCE GENERAL EVIDENCE OF A HIGHER PERCENTAGE OF BLACKS IN LOWER LEVELS OF THE DEFENDANT'S WORKFORCE THAN IN HIGHER LEVELS WITHOUT SPECIFIC STATISTICAL PROOF OF GROSS DISPARITIES BETWEEN PERSONS QUALIFIED FOR PROMOTION CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS

A. A Static Snapshot, Which Merely Reflects The Percentage Representation Of Blacks In Lower Versus Upper Levels Of A Defendant's Workforce Is Insufficient To Establish A *Prima Facie* Case Of Promotion Discrimination Absent Proof That Blacks In Lower Level Jobs Are Qualified For Promotion To Upper Levels.

Without qualification, the Fifth Circuit embraced the theory that a *prima facie* case of promotion discrimination can be established through static workforce data showing that as of a particular date, the percentage representation of a protected class in upper level positions is less than that group's percentage representation in lower level positions.[20]

Where, as here, special skills and qualifications are required for promotion to particular jobs,[21] comparative statistics must be limited to members of the protected group who possess such requisite skills and qualifications. *Hazelwood School District* v. *United States*, 433 U.S. at 308 n. 13. Indeed, following this Court's reasoning in *Mayor of Philadelphia* v. *Educational Equality League*, 415 U.S. 605, 620 (1974), unless "it can be assumed that all [of Uncle Ben's employees] are fungible for purposes of determining whether members of a particular class have been lawfully excluded," a comparison *without regard to qualifications* of the percentage of blacks holding lower level positions to the percentage holding upper level positions is meaningless.

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[20] According to the Fifth Circuit, "Plaintiffs' case of employment discrimination against blacks showed that the proportion of that group in each job grade did not reflect the proportion of blacks available for promotion from lower level jobs" (App. C-10). In support of this statement, the Circuit footnoted certain static workforce data evidencing a differential in the percentage representation of blacks in higher and in lower job grades, stating "the overall pattern appeared to be one of blacks being clustered in the lowest paying jobs" (App. C-10, n.2). Neither Plaintiff nor the Fifth Circuit was concerned with whether those blacks "available for promotion from lower job levels" were qualified for promotion.

[21] *See* note 3, *supra*.

This point has been expressly recognized by the Ninth Circuit in *Pack* v. *Energy Research & Development Administration*, 566 F.2d 1111 (9th Cir. 1977), citing *Mayor of Philadelphia* v. *Educational Equality League*, 415 U.S. at 620. Expressing agreement with the lower court's finding that the plaintiff's statistical evidence failed to establish a *prima facie* case of promotion discrimination, the Ninth Circuit stated:

> [Plaintiff] proved that on a given date at the [employer's] facility, approximately 98% of the employees at grades GS-11 and above were males, whereas 95% of the lower grade professionals were females. No evidence whatsoever was introduced to demonstrate that lower level professional women were qualified to occupy the higher positions.

Pack, 566 F.2d at 1113. *See also Piva* v. *Xerox*, 654 F.2d 596 (9th Cir. 1981).

The Second Circuit likewise has recognized that where, as in the instant case, special qualifications are required to fill particular jobs, statistical comparisons without reference to the group or pool of individuals possessing the necessary qualifications are "hopelessly flawed" and "totally wanting in probative value." *Ste. Marie* v. *Eastern Railroad Association*, 650 F.2d at 401, *citing Hazelwood*, 433 U.S. at 308 n.13.

Plaintiff's statistics relied on by the Fifth Circuit as establishing a *prima facie* case of promotion discrimination are equally flawed. Defendant established that a great many of Uncle Ben's jobs require knowledge or skills not presumptively possessed by the general population or Uncle Ben's work force and not obtainable through on-the-job training or experience at Uncle Ben's. Because, therefore, it cannot be assumed that all of Uncle Ben's employees are "fungible" for purposes of promotion analysis, plaintiff's static workforce comparison of the percentage of blacks in lower level positions with the percentage in upper level positions is not probative since such statistics fail to identify which, if any, blacks in lower levels are qualified for promotion to upper level positions.[22]

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[22] In response to Plaintiff's static workforce data showing that as of

B. Where, As Here, Claims of Discrimination Are Based Upon General Employment Policies, And Not Upon Specifically Elucidated Employment Criteria, Statistical Evidence Offered To Establish A *Prima Facie* Case Must Satisfy The Rigorous Statistical Proof Requirements Set Forth In *Teamsters* And *Hazelwood*.

The panel cited *Coe* v. *Yellow Freight System, Inc.*, 646 F.2d 444 (10th Cir. 1981), for the proposition that post-*Burdine* cases have not altered the rule that shifts the burden of persuasion to the defendant in disparate impact cases. *Coe* analyzed the case before it under both treatment and impact principles, holding that the plaintiffs had failed to establish a case under either theory. Accordingly, although *Coe* did indicate that courts have applied the disparate impact theory to allegations of "excess subjectivity," it was not faced with the necessity of deciding whether the impact theory was properly applicable.

Significantly, however, *Coe* did hold that even if the disparate impact theory were applicable to such "excess subjectivity," generalized allegations of discrimination, the *Hazelwood* and *Teamsters* statistical proof requirements would govern.

March 31, 1974, the percentage of blacks employed in Defendant's lower (generally unskilled) job zones exceeded the percentage employed in higher (generally skilled) job zones, Defendant established and the District Court *found* that the employment of blacks throughout Uncle Ben's job zones was not suggestive of a pattern of discrimination. Finding of Fact No. 14 (App. E-5). This finding was based upon favorable statistical comparisons between black representation in Uncle Ben's job levels and the availability of qualified blacks as reflected in Houston SMSA employment data. The relevance of external labor market comparisons in a promotion context has explicitly been recognized by the Fourth Circuit. Where special skills are required, external workforce comparisons, while not necessarily controlling as to the available labor pool, "may nonetheless be relevant." *EEOC* v. *Radiator Specialty Company*, 610 F.2d 178, 186 (4th Cir. 1979). "[P]roper regard must be given to ... qualified labor market statistics in the absence of evidence indicating the actual percentage of blacks in lower positions who possess the required qualifications." 610 F.2d at 186-87. *See also Hill* v. *Western Electric Company, Inc.*, 596 F.2d 99,105-06 (4th Cir. 1979). The Fifth Circuit's holding that external work force data is irrelevant on the issue of discrimination in promotions is at odds with these decisions.

> In cases where the employment practice objected to is not a specifically elucidated employment criteria, such as that found in *Griggs* and *Albemarle*, but the practice objected to is merely a general policy of the employer, it is important that the statistics bear great relevance to the policy under attack. In cases where the policy complained of includes a specific screening mechanism, such as ability tests and aptitude tests, the employer can rebut the statistical evidence presented by the plaintiff by validating the tests. But where the policy objected to is vague and general, once plaintiff shows discrimination by the use of statistics, the employer may only rebut the claim of discrimination by the use of statistics. Thus, the statistics used in cases not involving specific employment tests which serve as screening mechanisms for determining who should fill what job must be more closely scrutinized than the statistics used in cases where specific screening mechanisms are at issue. ***This is the approach followed by the Supreme Court when analyzing statistics in the general pattern or practice claims of discrimination, and this approach is equally applicable in disparate impact cases involving the same type of broadbased policies which are under attack.***

646 F.2d at 453 n.2 (emphasis supplied)(citations omitted).

Thus, without regard to whether the case is one of treatment or impact, *Hazelwood*[23] and *Teamsters*[24] are applicable. Based upon the *Coe* analysis, the Fifth Circuit clearly erred in reversing and remanding the instant case in light of (a) Plaintiff's failure to offer any unrepudiated and non-discredited statistics other than those showing a higher percentage of blacks at the lower levels of Defendant's workforce than at the upper levels, and (b) Plaintiff's failure to offer any comparison between the availability of blacks in the pool of persons *qualified* for

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[23] With respect to statistical proof, *Hazelwood* required (1) "gross" statistical disparities of two or three standard deviations; (2) that the hiring rate must be compared to the availability of persons with a specific skill needed; and (3) that the hiring to availability comparison must be within the time frame covered by the litigation.

[24] *Teamsters* found that disparate treatment was proven by a combination of evidence of over 40 specific instances of discrimination and overwhelming statistical proof. 431 U.S. at 342 n. 23.

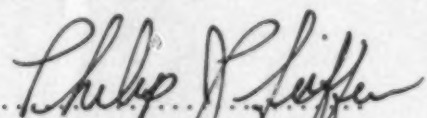
promotion compared to the percentage of blacks promoted during the relevant time frame,[25] much less statistics establishing a comparative disparity of two-to-three standard deviations.

The Fifth Circuit's approval of the unqualified use of static workforce data to establish a *prima facie* case of promotion discrimination conflicts with decisions of this Court and the Ninth and Second Circuits. Likewise, the Fifth Circuit's failure to apply the standards of statistical proof set forth in *Hazelwood* and *Teamsters* is contrary to the Tenth Circuit's analysis in *Coe*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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[25] Suit was initially filed under 42 U.S.C. §1981. The pretrial order stated the issue in terms of determining discrimination from and after March 28, 1972. The time frame under Section 1981 is consistent with *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974). The Title VII allegations were not added until September 12, 1974, with a relevant time frame under Title VII commencing April 11, 1974 — 180 days prior to the filing of the underlying EEOC charge. *United Airlines* v. *Evans*, 431 U.S. 553 (1977). Of course, intentional discrimination must be shown for that part of the relevant time frame covered only by Section 1981 — commencing March 28, 1972. *Crawford* v. *Western Electric Co.*, 614 F.2d 1300, 1308-09 (5th Cir. 1980).

CERTIFICATE OF SERVICE

I, Philip J. Pfeiffer, attorney for Petitioner Uncle Ben's, Inc., do hereby certify that on this 30th day of April, 1982, three copies of the foregoing Petition were mailed to each of the following counsel of record for the Plaintiff in this proceeding:

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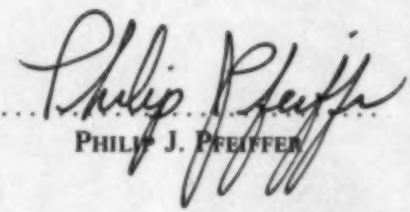

PHILIP J. PFEIFFER

Appendix

No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

UNCLE BEN'S, INC.,

Petitioner,

v.

THOMAS JOHNSON, Individually, and on Behalf of all Others Similarly Situated,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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THOMAS JOHNSON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Plaintiffs-Appellants,

v.

UNCLE BEN'S, INC.,
Defendant-Appellee.

No. 78-1437.

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

Sept. 30, 1981.

Class action was brought on behalf of class of Black persons and Mexican-American persons alleging that employer had engaged in a variety of discriminatory employment practices. The United States District Court for the Southern District of Texas, Ross N. Sterling, J., dismissed all claims relating to Mexican-Americans, most of the claims relating to Blacks and entered judgment in favor of employer on the remaining issue, and appeal was taken. The Court of Appeals, 628 F.2d 419, vacating opinion, 615 F.2d 917, modified and affirmed in part and reversed in part and remanded. The Supreme Court, 101 S.Ct. 1967, remanded the case for further consideration. On remand, the Court of Appeals, Vance, Circuit Judge, held that respective burdens of plaintiffs and defendant in Title VII disparate impact case were not affected by Supreme Court decision holding that once a plaintiff has established a prima facie case of disparate treatment burden shifts to defendant to rebut such showing by producing evidence that the plaintiff was rejected, or someone else preferred, for a legitimate, nondiscriminatory reason.

Modified and affirmed in part, reversed in part and remanded.

Thomas, District Judge, dissented and filed opinion.

1. Civil Rights — 43

Respective burdens of plaintiffs and defendant in Title VII disparate impact case were not affected by United States

Supreme Court decision holding that once a plaintiff has established a prima facie case of disparate treatment the burden shifts to the defendant to rebut such showing by producing evidence that the plaintiff was rejected, or someone else preferred, for a legitimate nondiscriminatory reason. Civil Rights Act of 1964, §701 et seq., 42 U.S.C.A. §2000e et seq.

2. Civil Rights — 43

In Title VII disparate impact cases the plaintiff challenges the practices that are fair in form, but discriminatory in operation and need not prove intentional discrimination. Civil Rights Act of 1964, §701 et seq., 42 U.S.C.A §2000e et seq.

3. Civil Rights — 43

In a Title VII disparate treatment case, plaintiff must show that he has been the victim of an intentional discrimination. Civil Rights Act of 1964, §701 et seq., 42 U.S.C.A. §2000e et seq.

4. Federal Courts — 44(1)

In making a prima facie case in a Title VII disparate impact suit, plaintiff must not merely prove circumstances raising an inference of discriminatory impact; he must prove the discriminatory impact at issue; it is not part of the plaintiff's burden to prove absence of a legitimate business reason for the challenged employment practice. Civil Rights of 1964, §701 et seq., 42 U.S.C.A. §2000 et seq.

Appeal from the United States District Court for the Southern District of Texas.

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before VANCE and SAM D. JOHNSON, Circuit Judges, and THOMAS,* District Judge.

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* District Judge of the Southern District of Alabama, sitting by designation.

VANCE, Circuit Judge:

Following the decision of this panel, 628 F.2d 419 (5th Cir. 1980), the Supreme Court, — U.S. —, 101 S.Ct. 1967, 68 L.Ed.2d 290 (1981), remanded this case for further consideration in light of its opinion in *Texas Department of Community Affairs* v. *Burdine*, — U.S. —, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). After carefully reviewing our decision, we conclude that our result is not altered by *Burdine*.

In *Burdine*, the Supreme Court clarified the basic allocation of burdens and order of presentation of proof in Title VII cases alleging disparate treatment. These burdens are determined by the factors stated in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973). *Burdine* altered this circuit's interpretation of the *McDonnell Douglas* factors in two respects. Prior to *Burdine* we had held once the plaintiff had established a prima facie case of disparate treatment, the burden was upon the defendant to rebut this showing by a preponderance of the evidence. *Ray* v. *Freeman*, 626 F.2d 439, 443 (5th Cir. 1980), *cert. denied*, — U.S. —, 101 S.Ct. 1701, 68 L.Ed.2d 198 (1981); *Turner* v. *Texas Instruments, Inc.*, 555 F.2d 1251, 1255 (5th Cir. 1977). In addition, we required that the defendant prove that the person actually hired was better qualified than the plaintiff. *Falcon* v. *General Telephone Co. of the Southwest*, 626 F.2d 369, 378 (5th Cir. 1980), *vacated*, — U.S. —, 101 S.Ct. 1752, 68 L.Ed.2d 234 (1981); *East* v. *Romine, Inc.*, 518 F.2d 332, 339-40 (5th Cir. 1975). In *Burdine* the Court rejected our interpretation of the defendant's burden:

> The burden that shifts to the defendant . . . is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason . . . It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the

introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant.

Id., — U.S. at —, 101 S.Ct. at 1094 (footnote omitted). While the Court cautioned that the defendant's explanation of its legitimate reaons must be clear and reasonably specific, *id.*, — U.S. at —, 101 S.Ct. at 1096, it made clear that the defendant carries a burden of production, not a burden of persuasion.

The Supreme Court also stated that the employer need not demonstrate that the person actually hired was better qualified than the plaintiff. If the employer produces evidence that on the basis of legitimate, nondiscriminatory criteria the person chosen for the job possesses qualifications equal to those of the plaintiff, he rebuts the prima facie case. "[T]he employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria." *Id.* — U.S. —, 101 S.Ct. at 1097.

[1, 2] While *Burdine* thus affects the burdens of the parties in Title VII disparate treatment cases, it does not address Title VII disparate impact cases.[1] Indeed, *Burdine* explicitly affirms the distinction between the two kinds of cases, noting that "the character of the evidence presented" differs in the two branches of Title VII law. — U.S. at —, 101 S.Ct. at 1093 n.5.[2] In

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[1] We note that the reason given by the Supreme Court for granting certiorari in *Texas Dep't of Community Affairs* v. *Burdine*, — U.S. —, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), was to resolve a conflict among the circuits. *Id.*, — U.S. at —, 101 S.Ct. at 1093. The only cases cited by the Supreme Court as evidence of this conflict were cases involving claims of disparate treatment. *Id.*, — U.S. at —, 101 S.Ct. at 1093 n.4.

[2] *See also id.*, — U.S. at —, 101 S.Ct. at 1094 n.8, where the Court stated that the allocation of burdens set forth in *Burdine* is suited to the task of "sharpen[ing] the inquiry into the elusive factual question of intentional discrimination." Because no question of intentional discrimination arises under the disparate impact theory, *Teamsters* v. *United States*, 431 U.S. 324, 335 n.15, 97 S.Ct. 1843,

disparate impact cases the plaintiff challenges "practices that are fair in form, but discriminatory in operation," *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431, 91 S.Ct. 849, 853, 28 L.Ed.2d 158 (1971) and need not prove intentional discrimination, *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 335 n.15, 97 S.Ct. 1843, 1854, n.15, L.Ed.2d 396 (1977). The Supreme Court has described the burdens in a disparate impact case as follows:

> [T]o establish a prima facie case of discrimination, a plaintiff need only show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern. Once it is thus shown that the employment standards are discriminatory in effect, the employer must meet "the burden of showing that any given requirement [has] . . . a manifest relationship to the employment in question." *Griggs* v. *Duke Power Co., supra*, at 432, [91 S.Ct., at 854]. If the employer *proves* that the challenged requirements are job related, the plaintiff may then show that other selection devices without a similar discriminatory effect would also "serve the employer's legitimate interest in 'efficient and trustworthy workmanship.' " [citations omitted] [emphasis added].

Dothard v. *Rawlinson*, 433 U.S. 321, 329, 97 S.Ct. 2720, 2726, 53 L.Ed.2d 786 (1977).

The respective burdens in a disparate impact case are thus governed by clear and recent Supreme Court precedent unaltered by *Burdine*. We are, of course, bound by this precedent and by the statements of our own court left unaffected by *Burdine*. *See James* v. *Stockham Valves & Fittings Co.*, 559 F.2d 310, 330 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034, 98 S.Ct. 767, 54 L.Ed.2d 781 (1978); *Rowe* v. *General Motors Corp.*, 457 F.2d 348, 354-55 (5th Cir 1972).[3]

1854, n.15, 52 L.Ed.2d 396 (1977), the allocative scheme in *Burdine* was not formulated to develop the factual inquiry in a disparate impact case.

[3] Since the decision of the Supreme Court in *Burdine* two district

[3,4] That the burden upon the defendant in rebutting a prima facie case should vary in the two branches of Title VII law is understood by looking to the nature of the prima facie case and the plaintiff's ultimate burden. In a disparate treatment case, the plaintiff must show that he has been the victim of intentional discrimination. "A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 577, 98 S.Ct. 2943, 2949, 57 L.Ed.2d 957 (1978). As the Court has noted, "[E]stablishing a prima facie case of disparate treatment is not onerous." *Burdine*, — U.S. at —, 101 S.Ct. at 1094. In making a prima facie case in a disparate impact suit, however, the plaintiff must not merely prove circumstances raising an inference of discriminatory impact; he must prove the discriminatory impact at issue. It is not part of the plaintiff's burden to prove absence of a legitimate business reason for the

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courts in this circuit have expressly held that *Burdine* does not affect fifth circuit precedent in the area of disparate impact. *Vuyanich* v. *Republic Nat'l Bank*, — F.Supp. —, 50 U.S.L.W. 2096 (N.D.Tex. Aug. 4, 1981); *Heffernan* v. *Western Elec. Co.*, 510 F.Supp. 712, 716 (N.D.Ga. 1981). Post-*Burdine* cases from the second and tenth circuits have not altered the rule contained in the pre-*Burdine* cases from those circuits which shifts the burden of persuasion to the defendant in disparate impact cases under Title VII. *Compare Teal* v. *Connecticut*, 645 F.2d 133, 136 n.5 (2d Cir. 1981) *and Coe* v. *Yellow Freight Sys., Inc.*, 646 F.2d 444, 451 (10th Cir. 1981) (post-*Burdine* cases) with *Vulcan Soc'y of N.Y. City Fire Dep't* v. *Civil Serv. Comm'n*, 490 F.2d 387, 393 (2d Cir 1973) *and EEOC* v. *Navajo Ref. Co.*, 593 F.2d 988, 990 (10th Cir. 1979) (pre-*Burdine* cases). But cf *NAACP* v. *Medical Center, Inc.*, — F.2d — at — – — No. 80-1893, slip op. at 22-27 (3d Cir. June 19, 1981) (en banc) (*Burdine* affects allocation of proof in disparate impact case under Title VI). Additionally, one panel of this circuit has properly refrained from overturning a line of fifth circuit precedent which allocated the burden of persuasion to school districts in a certain class of cases arising under Title VI of the Civil Rights Act. *Castaneda* v. *Pickard*, 648 F.2d 989, 994 n.2 (5th Cir. 1981).

challenged practice. Knowledge of a legitimate business reason is uniquely available to the employer who is accordingly required to persuade the court of its existence by a preponderance of the evidence.

The present case involves charges of disparate impact. On remand, the respective burdens of plaintiffs and defendant are thus unaffected by *Burdine*. We note that our decision in this case made reference to the standards of rebuttal in Title VII disparate treatment cases which, of course, have now been altered by *Burdine*. This language, however, was not essential to our opinion. The principles governing disparate impact cases have been clearly established by the Supreme Court and by the opinions of this circuit. *Burdine*, which dealt with a wholly different type of discrimination suit, in no way diminishes the vitality of these decisions.

We therefore remand for further proceedings in accordance with our prior opinion on petition for rehearing.

MODIFIED AND AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

DANIEL H. THOMAS, District Judge, dissenting:

The majority has determined that this case is unaltered by the decision of the United States Supreme Court in *Burdine*. This decision is based on the distinction between a case of disparate treatment and a case of disparate impact. The question which arises is what burden is placed on the employer after the plaintiff puts forth a *prima facie* case of discrimination.

Prior to *Burdine*, as the majority has stated, in a disparate treatment case the employer had to rebut the *prima facie* case by a preponderance of the evidence. After *Burdine*, the employer need only bear the burden of production of evidence of a legal reason for his action. Thus the burden of the employer is a burden of production rather than a burden of proof as required by this Circuit prior to *Burdine*.

In a disparate impact case, the burden placed upon the employer to rebut a *prima facie* case is a showing that the questioned standard to practice has a manifest relationship to the employment. The majority has carefully selected and emphasized language from a Supreme Court case which allegedly "describes the burden in a disparate impact case." The majority emphasizes the word "proves" in the statement "(i)f the employer proves that the challenged requirements are job related, the plaintiff may then show that other selection devices ... would also 'serve the employer's legitimate interest ...'" This wording would seem to indicate that the employer must assume the burden of proof in any disparate impact case, and this is the precedent in this Circuit to date.

I believe, however, that in referring this Court to *Burdine*, the Supreme Court did not wish this Court to distinguish a case involving disparate treatment, such as *Burdine*, and a case involving disparate impact, such as this case. The majority is correct in pointing out that Burdine acknowledges and affirms a distinction between the two types of cases. The Supreme Court in *Burdine* "set forth the basic allocation of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment." The Court then footnoted that "(w)e have recognized that the factual issues, and therefore the character of the evidence presented, differ when the plaintiff claims that a facially neutral employment policy has a discriminatory impact on protected classes." The majority has taken these statements together with the prior Supreme Court statement regarding "proof" required of the employer and has determined that "(t)he respective burdens in a disparate impact case are thus governed by clear and recent Supreme Court precedent unaltered by *Burdine*." If such be the case, there was no reason for the Supreme Court to refer this Court to *Burdine*. I believe that the burden of proof in all cases of disparate treatment and disparate impact remains with the plaintiff and that only the burden of production shifts to the employer. The "character of the

evidence" required of the employer in each type of case will vary as do the factual situations, but the "basic allocation of burdens and order or presentation of proof" remains the same in each type of case.

In regard to this case, however, I do not find the necessity of determining this "burden" in regard to all issues other than discrimination against blacks with respect to promotions. As I stated in my previous dissent, I conclude that the district court did not err in holding that the plaintiffs failed to establish a *prima facie* case in regard to these issues. I, therefore, am of the opinion that no burden needed to be met by the employer in regard to these issues.

As previously stated in my original dissent, I conclude that the district court's findings regarding the lack of discrimination in the promotion of blacks was not clearly erroneous. The majority in its original opinion held that the clearly erroneous standard of review did not apply to findings based on an erroneous view of legal principles. The majority then undertook an "independent analysis of the record in light of the correct legal standards."

The district court determined that plaintiffs' statistical evidence and testimonial evidence made out a *prima facie* case of discrimination against blacks on the promotion issue, but held that this had been rebutted by both the absence of discriminatory explanations of the status quo and further determined that plaintiffs did not introduce evidence that these explanations were pretextual.

I would affirm the judge of the district court outright. I therefore respectfully dissent from the modification and remand of the majority opinion.

Supreme Court of the United States

No. 80-1420

UNCLE BEN'S, INC.,

Petitioner,

v.

THOMAS JOHNSON, Individually and on behalf of all others similarly situated

ON WRIT OF CERTIORARI to the United States Court of Appeals for the Fifth Circuit.

THIS CAUSE having been submitted on the petition for writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause is vacated with costs, and that this cause is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. _____ (1981).

IT IS FURTHER ORDERED that the petitioner, Uncle Ben's, Inc., recover from respondent Two Hundred Dollars ($200.00) for its costs herein expended.

April 20, 1981

THOMAS JOHNSON INDIVIDUALLY, AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellants.

v.

UNCLE BEN'S, INC.,

Defendant-Appellee.

No. 78-1437.

UNITED STATES COURT OF APPEALS,

FIFTH CIRCUIT.

OCT. 17, 1980.

Class action was brought on behalf of class of black persons and Mexican-American persons alleging that employer had engaged in a variety of discriminatory employment practices. The United States District Court for the Southern District of Texas, 615 F.2d 917, Ross N. Sterling, J., dismissed all claims relating to Mexican-Americans, most of the claims relating to blacks and entered judgment in favor of employer on the remaining issue, and appeal was taken. The Court of Appeals, Vance, Circuit Judge, held that: (1) trial court adopted an erroneous notion of controlling legal principles regarding use and role of statistics in employment discrimination case; (2) dismissal of claims regarding Mexican-Americans would be without prejudice where trial court failed to rectify the situation when it became apparent that plaintiffs did not adequately represent class of Mexican-Americans; and (3) case would be remanded for preparation of new findings on discriminatory impact with regard to promotion of blacks.

Modified and affirmed in part; reversed in part and remanded.

Daniel Holcombe Thomas, District Judge, filed dissenting opinion.

1. Civil Rights 44(1)

Where gross statistical disparities can be shown, they alone may constitute prima facie proof of pattern of practice of discrimination in employment.

2. Civil Rights 43

Plaintiffs in a class action employment discrimination case do not need to prove knowing and intentional discrimination to prove a disparate impact case nor must plaintiffs prove a racially disproportionate impact with complete mathematical certainty.

3. Federal Courts 850

Clearly erroneous standard of review does not apply to findings of fact premised upon an erroneous view of controlling legal principles.

4. Federal Courts 858

District court's findings in employment discrimination case, which were based on erroneous notion of controlling legal principles regarding use and role of statistics, were not entitled to any deference on appeal.

5. Civil Rights 44(1)

There was no substantial evidence before court of discriminatory employment practices against Mexican-Americans during period covered by the suit and therefore trial court properly dismissed claims regarding upon Mexican-Americans.

6. Federal Civil Procedure 173

In class action, trial court has duty to supervise plaintiffs' presentation to safeguard rights of class being represented. Fed. Rules Civ.Proc. Rule 23, 28 U.S.C.A.

7. Federal Civil Procedure 173, 176, 1827

When it became apparent that plaintiffs, who brought class action on behalf of class of black persons and Mexican-American persons alleging discriminatory employment practices, did not adequately represent Mexican-Americans, trial court should have taken action such as dividing certified class into separate subclass for Mexican-American members, decertifying that class, or certifying a second class and to remedy trial court's failure in such respect, trial court's dismissal of all claims regarding Mexican-Americans would be without prejudice. Fed.Rules Civ.Proc. Rule 23(c)(4), 28 U.S.C.A.

8. Civil Rights 43, 44(4)

Plaintiffs' statistical evidence and testimonial evidence made out a prima facie showing of discrimination against blacks with regard to promotions and therefore burden shifted to employer to go forward with evidence as to either existence of legitimate, nondiscriminatory reasons for its actions by a preponderance of the evidence or total unacceptability of plaintiff's statistical proof. Civil Rights Act of 1964, § 701 *et seq.*, 42 U.S.C.A. § 2000e *et seq.*

9. Civil Rights 44(4)

If employer ordinarily employed individuals for upper level positions by hiring laterally from outside company, then relevant statistical comparison for determining validity of allegations that employer discriminated against blacks in promotion practices would be between black/white ratio in each of employer's jobs and general or qualified outside labor force and if employer promoted from within, statistical comparison would be against employer's internal work force. Civil Rights Act of 1964, § 701 *et seq.*, 42 U.S.C.A. § 2000e *et seq.*

10. Civil Rights 46

In class action alleging that employer discriminated against blacks with regard to promotions, trial court erred in tacitly approving part of employer's promotion system which was based on use of subjective supervisory evaluations made by groups of white supervisors.

11. Civil Rights 2

Title VII was specifically designed to remove artificial, arbitrary, and unnecessary barriers to employment when barriers operate invidiously to discriminate on basis of racial or other impermissible classification. Civil Rights Act of 1964, § 701 *et seq.*, 42 U.S.C.A. § 2000e *et seq.*

12. Civil Rights 9.13

Educational requirement for a job is lawful if it is required by business necessity and valid under EEOC's uniform guidelines on employee selection procedures. Civil Rights Act of 1964, § 701 *et seq.*, 42 U.S.C.A. § 2000e *et seq.*

Appeal from the United States District Court for the Southern District of Texas.

ON PETITION FOR REHEARING

Before VANCE and SAM D. JOHNSON, Circuit Judges, and THOMAS*, District Judge.

VANCE, Circuit Judge:

The motion for rehearing is granted, 615 F.2d 917 (5th Cir.). This panel's unpublished opinion of April 11, 1980, 615 F.2d 917 (5th Cir.), is vacated in its entirety.

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* District Judge of the Southern District of Alabama, sitting by designation.

I.

This appeal challenges the district court's disposition of a class action brought pursuant to section 1981, 42 U.S.C. § 1981, and Title VII, 42 U.S.C. § 2000e *et seq.* Suing on behalf of a class of black persons and Mexican-American persons who have been, are, or may be, employed by defendant Uncle Ben's, Inc., plaintiffs alleged in their complaint that Uncle Ben's had engaged in a variety of discriminatory employment practices. Specifically, they contended that Uncle Ben's discriminated against both groups in compensation, hiring, promotion, transfer, seniority and other terms and conditions of employment. The district court, however, held that plaintiffs had failed to present a prima facie case showing discriminatory treatment of Mexican-Americans and on all but one issue regarding blacks, and, therefore, it dismissed as to these issues at the conclusion of plaintiffs' case. On that one issue, the district court found that plaintiffs had established a prima facie case of discrimination against blacks in promotion, but ultimately ruled in favor of Uncle Ben's on this point as well.

II.

The district court adopted and applied an erroneous notion of the controlling legal principles regarding the use and role of statistics in an employment discrimination case. In discussing the promotion issue, the district court stated,

> If we accept the Plaintiff's side of the case, all that the experts say, the way I see it, is that *what has transpired in the real world at Uncle Ben's could not have statistically happened by chance.* We are not here to enforce a law which says that things must occur within the limits of mathematical probability. The law says the defendant may not discriminate on the basis of race. *The law does not say that the defendant shall not violate the rules of mathematical probability.*

> A Business such as the Defendant's cannot be run successfully by chance. Decisions as to who may best serve in any given job must be made rationally by persons with sufficient knowledge of the individuals and jobs involved to make such decisions.

(Emphasis added.) This standard is incorrect.

[1, 2] Statistics as to racial composition of the defendant's work force serve an important role in judging employment discrimination cases. *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 339, 97 S.Ct. 1843, 1856, 52 L.Ed.2d 396 (1977); *Fisher* v. *Procter & Gamble Manufacturing Co.*, 613 F.2d 527, 543 – 44 (5th Cir. 1980). "Where gross statistical disparities can be shown, they alone may . . . constitute prima facie proof of a pattern or practice of discrimination." *Hazelwood School District* v. *United States*, 433 U.S. 299, 307 – 08, 97 S.Ct. 2736, 2741, 53 L.Ed.2d 768 (1977). *See also Fisher* v. *Procter & Gamble Manufacturing Co.*, 613 F.2d at 544; *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 225 & n.34 (5th Cir. 1974). The class plaintiffs do not need to prove knowing and intentional discrimination to prove a disparate impact case. *International Brotherhood of Teamsters* v. *United States*, 431 U.S. at 335 n.15, 97 S.Ct. at 1854 – 1855 n.15; *Scott* v. *City of Anniston*, 597 F.2d 897, 898 (5th Cir. 1979), *cert. denied* —— U.S.——, 100 S.Ct. 1850, 64 L.Ed.2d 271 (1980). Nor must the plaintiffs prove a racially disproportionate impact with " 'complete mathematical certainty.' " *James* v. *Stockham Valves & Fittings Co.*, 559 F.2d 310, 337 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034, 98 S.Ct. 767, 54 L.Ed.2d 781 (1978) (quoting *Vulcan Society of the New York City Fire Department, Inc.* v. *Civil Service Commission*, 490 F.2d 387, 393 (2d Cir. 1973)).

[3, 4] The clearly erroneous standard of review does not apply to findings of fact premised upon an erroneous view of

controlling legal principles. *Parson* v. *Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374, 1382 (5th Cir. 1978), *cert. denied*, 441 U.S. 968, 99 S.Ct. 2417, 60 L.Ed.2d 1073 (1979); *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1372 n.20 (5th Cir. 1974). The district court's findings based on its misunderstanding of this legal standard are entitled to no deference. We must undertake an independent analysis of the record before us in light of the correct legal standards.

III.

Plaintiffs alleged that between 1972 and the institution of this suit in 1974, and as far back as 1960,[1] Mexican-American workers, who comprise nine percent of Houston's labor market, constituted only four percent of Uncle Ben's employees. This gross disparity between Uncle Ben's workforce and the relevant labor market, which is statistically significant, ordinarily would satisfy plaintiff's initial burden of establishing a prima facie case of hiring discrimination. *Hazelwood School District* v. *United States*, 433 U.S. at 307 – 08, 97 S.Ct. at 2741 – 2742; *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d at 225 & n.34. Despite Uncle Ben's' contrary claims, we ascribe no affirmative legal significance to Uncle Ben's' increase in the number of its Mexican-American employees subsequent to the filing of this

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[1] Discrimination prior to the effective date of Title VII, July 2, 1965, can be considered under two theories. Since the appellant's allegations are also made under 42 U.S.C.A. § 1981, employment practices prior to 1965 may be examined. Secondly, this court specifically explained in *United States* v. *Jacksonville Terminal*, 451 F.2d 418, 441 (5th Cir. 1971), *cert. denied* 406 U.S. 906, 92 S.Ct. 1607, 31 L.Ed.2d 815 (1972), and *affirmed* in *Burns* v. *Thiokol Chemical Corp.*, 483 F.2d 300 (5th Cir. 1973), that pre-act discriminatory conduct is highly relevant, especially, when considering neutral practices under Title VII alleged to carry forward past discriminatory effects. *See United States* v. *Dillon Supply Co.*, 429 F.2d 800 (4th Cir. 1970). *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d at 218 n. 10. *See also Hazelwood School Dist.* v. *United States*, 433 U.S. 299, 309 n. 15, 97 S.Ct. at 2742 – 2743 n. 15, 53 L.Ed.2d 768 (1977).

suit. *International Brotherhood of Teamsters* v. *United States*, 431, U.S. at 341 – 42, 97 S.Ct. at 1857 – 1858; *Parson* v. *Kaiser Aluminum & Chemical Corp.*, 575 F.2d at 1385 – 86.

This case nevertheless raises a difficult problem involving whether there was evidence of Uncle Ben's substantial underutilization of Mexican-Americans at the close of plaintiffs' direct case. Uncle Ben's asserts that the district court properly dismissed plaintiffs' allegations of discrimination against Mexican-Americans because at the close of plaintiffs' case the record was devoid of evidence supporting such allegations. We agree.

[5] Plaintiffs' case regarding Mexican-Americans rested on the testimony of their expert, Richard Alfred Tapia, to the effect that Uncle Ben's substantially underutilized Mexican-Americans. On cross examination, however, Dr. Tapia disclosed that he had relied on statistics relating to 1975, more than a year after suit was filed. He conceded that he had no information regarding the number of Mexican-Americans employed and terminated during the period covered by the suit. He conceded further that the basis for his opinion did not include prior interviews with any of Uncle Ben's' employees or an examination of any of the company's personnel files. Dr. Tapia relied instead on Uncle Ben's' answers to interrogatory number 13 alone, which Dr. Tapia acknowledges he incorrectly assumed to relate to 1974. In fact, the information related to September 12, 1975. This interrogatory answer was introduced into evidence. Plaintiffs' counsel failed to offer other available evidence that contained the 1974 data that would have established a prima facie case of discrimination. Because there was no substantial evidence before the court of discrimination during the period covered by the suit, the district court correctly dismissed the claim regarding Mexican-Americans. Plaintiffs' counsel never sought to have the claim reopened when the availability of the needed data became evident.

IV.

The district court originally, and at the time quite correctly, determined that plaintiff would adequately represent the certified class of blacks and Mexican-Americans. At trial, however, representation of the class of Mexican-Americans was not adequate. The thrust of plaintiff's direct case concerned the situation involving black employees. Although this may well have been necessary on the issue of promotion considering the small number of Mexican-Americans employed by Uncle Ben's, plaintiffs' preoccupation with the issue of black promotion seemingly led them to omit to introduce into evidence the number of Mexican-Americans hired by Uncle Ben's.

[6, 7] Under Rule 23 of the Federal Rules of Civil Procedure, the trial court has a duty to supervise plaintiffs' presentation to safeguard the rights of the class being represented. *Grigsby* v. *Northern Mississippi Medical Center, Inc.*, 586 F.2d 457, 462 (5th Cir. 1978); *Guerine* v. *J & W Investment, Inc.*, 544 F.2d 863, 864-65 (5th Cir. 1977). When it became apparent that plaintiffs did not adequately represent the Mexican-Americans, the trial court should have taken action such as dividing the certified class into a separate subclass for the Mexican-American members, *see* Fed.R.Civ.P. 23(c)(4), decertifying that class, or certifying a second class. To remedy the trial court's failure in this respect we now hold that dismissal of all claims regarding Mexican-Americans is without prejudice. This judgment does not have res judicata effect against them in light of plaintiffs' total failure adequately to represent them. *Sam Fox Publishing Co.* v. *United States*, 366 U.S. 683, 691, 81 S.Ct. 1309, 1314, 6 L.Ed.2d 604 (1961) ("the judgment in a class action will bind only those members of the class whose interests have been adequately represented by existing parties to the litigation"); *Grigsby* v. *North Mississippi Medical Center,*

586 F.2d at 461-62; *Gonzales* v. *Cassidy*, 474 F.2d 67, 73-75 (5th Cir. 1973).

V.

Plaintiffs' case of employment discrimination against blacks showed that the proportion of that group in each job grade did not reflect the proportion of blacks available for promotion from lower job levels.[2] Plaintiffs further alleged that Uncle Ben's filled its better jobs generally by promoting employees from within the firm rather than making lateral hires from without. Blacks, therefore, tended to remain in those low paying, entry level positions while similarly situated whites advanced upward from such positions.

[8] The district court correctly determined that plaintiffs' statistical evidence and testimonial evidence made out a prima facie showing of discrimination against blacks on the promotion issue. *E.g.*, *Watkins* v. *Scott Paper Co.*, 530 F.2d 1159, 1185-86 (5th Cir.), *cert. denied*, 429 U.S. 861, 97 S.Ct. 163, 50 L.Ed.2d 139 (1976); *Rowe* v. *General Motors Corp.*, 457 F.2d 348,357 (5th Cir. 1972). Uncle Ben's then had the " 'onus of going forward with the evidence and the burden of persuasion,' " *James* v. *Stockham Valves & Fittings Co.*, 559 F.2d at 330 (quoting *United States* v. *Hayes International Corp.*, 456 F.2d 112, 120 (5th Cir. 1972)), as to either the existence of "legitimate, nondiscriminatory reasons for [its] action by a preponderance of the evidence," *Turner* v. *Texas Instruments, Inc.*, 555 F.2d

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[2] Plaintiffs' demonstrated, *inter alia*, that of the 172 plant hourly positions, 118 such positions were held by blacks (68.6%). In the next four higher zones, blacks held 30 of the 67 positions (44.8%). Taking higher plant hourly pay zones into account as well as all office hourly jobs and the salaried jobs, blacks represented 35.8% of Uncle Ben's total work force. The overall pattern appeared to be one of blacks being clustered in the lowest paying jobs. Even those few blacks who entered the generally more desirable salaried jobs tended to be clustered in the least remunerative and responsible jobs at those levels.

1251, 1255 (5th Cir. 1977), or the total unacceptability of plaintiffs' statistical proof, *see EEOC* v. *Datapoint Corp.*, 570 F.2d 1264,1269 (5th Cir. 1978) ("statistics must be relevant, material and meaningful, and not segmented and particularized and fashioned to obtain a desired conclusion"); *Robinson* v. *Union Carbide Corp.*, 538 F.2d 652, 658 (5th Cir. 1976), *cert. denied*, 434 U.S. 822, 98 S.Ct. 65, 54 L.Ed.2d 78 (1977); *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d at 1371.

The trial court held that plaintiffs' prima facie case had been rebutted by Uncle Ben's evidence showing both the absence of discriminatory impact and the presence of "legitimate, nondiscriminatory" explanations for the status quo. Plaintiffs did not introduce evidence that these explanations were pretextual.

The findings regarding the absence of discriminatory impact are, in pertinent part, as follows:

> 11. Plaintiff also introduced through Dr. Tappia [sic] evidence of differences in upward mobility-wage increases received by Defendant's black and white employees.... Such evidence does not, however, when considered in conjunction with countervailing evidence of individual cases offered by Defendant, establish discriminatory treatment of Defendant's black employees.
>
> 12. During the period from August 8, 1971 through May 10, 1974, limiting the analysis to employees who were employed on both dates, Defendant's black employees received a statistically significant greater wage increase than did Defendant's white employees.... Further, ... the Court finds that the percentage increase in black wages exceeded the percentage increase in white wages regardless of whether or not individuals in job classifications falling within the EEOC category "Officials & Managers" are included.... Utilizing salary level groupings suggested by Plaintiff's Exhibit No. 8, e. g., employees earning less than a

given amount, any differences in black-white wage increases during the 1971-74 period were not statistically significant.

13. The Court finds that any differences in wage increases received by black and white employees, or claimed differences in upward mobility as between black and white employees, were due to specific individual attributes of Defendant's employees. Such differences were not due to the race of the employee concerned. The referenced attributes or upward mobility factors include, for example, limited ability to read, write and make numerical calculations; promotion refusals; demotion requests; non-shift work requests; lack of interest in changing jobs; and performance shortcomings.

14. As of March 31, 1974, the Defendant employed 141 blacks out of a total work force of 394 employees. Considering the job classifications utilized at defendant's facilities and the necessary requirements for those jobs, and based upon the 1970 United States Census availability data, the Court finds the Defendant employed an equitable number of blacks in view of their availability within the Houston SMSA.

* * * *

19. In terms of the number of employees promoted, their time in grade prior to promotion and the wage increases received upon being promoted, the Court finds that there has been no statistically significant difference in the treatment of Defendant's black and white employees.

The district court's findings concerning legitimate, nondiscriminatory reasons are, in relevant part, as follows:

15. The large number of black employees employed within defendant's lower job zones is not the result of racial discrimination.

16. The Court finds, based upon the testimony of Dr. Richard Jeanneret, an expert in the field of industrial psychology and job analysis, that Defendant's requirements for its jobs are valid, job-related and necessary. The Court further finds that certain of Defendant's jobs require knowledge and skills not obtainable through on-the-job or internal Company training or experience.

17. The job classifications/positions within Defendant's Office differ greatly from those within its Plant. They involve and require different skills, knowledge and training.

18. Because of the Office-Plant differences, and because the lines of progression and patterns of promotion respecting wage differentials and time in grade differ significantly, statistical analyses which separate Office and Plant employees are proper and allow meaningful comparisons to be made and conclusions to be drawn. The joinder or lumping together of Office and Plant employees does not provide a meaningful or valid basis for comparing the treatment of black and white employees.

On the discriminatory impact issue, Uncle Ben's persuaded the district court that the black/white ratio in each of Uncle Ben's job levels should be compared to the black/white ratio in comparable jobs in the Houston SMSA, and not compared to the black/white ratio in the relevant lower job level(s) at Uncle Ben's. The district court accepted this argument and, because of the favorable statistical comparison between Uncle Ben's at various levels and similar Houston SMSA job levels, found that Uncle Ben's had not violated Title VII.

[9] The dispositive issue is whether Uncle Ben's ordinarily employs individuals for upper level positions by hiring laterally from outside the company or by promoting from within. If it hires laterally, the relevent comparison is to the general or qualified outside labor force. If Uncle Ben's fills jobs by promotion,

the relevant comparison, as we recognized in *James* v. *Stockham Valves & Fittings Co.*, 559 F.2d at 331, 341, is the company's internal work force. *Accord, Hereford* v. *Huntsville Board of Education*, 574 F.2d 268, 272-273 (5th Cir. 1978). The applicability of *James* in any given case turns on whether vacancies in non-entry level positions are or could be filled by promotion. If the vacant positions ordinarily are filled by lateral hires or hiring from among graduates or relevant educational programs, then the rigid *James* rule is inapplicable. *See Mayor of Philadelphia* v. *Educational Equality League*, 415 U.S. 605, 620-21, 94 S.Ct. 1323, 1333-1334, 39 L.Ed.2d 630 (1974); *Hester* v. *Southern Ry.*, 497 F.2d 1374, 1379 n.6 (5th Cir. 1974).

The difficulty is that most cases fall between these extremes of exclusive promotion and of exclusive non-promotion. As a general matter, however, cases are dealt with in terms of the extreme to which they most closely accord. In addition, the necessity of non-promotions in certain jobs — or even in the majority of jobs within a company — should not foreclose an inquiry at trial into whether the remaining jobs filled by promotion are discriminatorily filled.

The district court frankly ignored deciding the questions of whether any promotion or upward mobility occurs at Uncle Ben's, and, if so, whether blacks suffer a disparate impact in seeking promotions. The trial court's findings 11-13 and 19 suggest that promotions occur. Findings 14-16 suggest that no promotions are made from Plant to Office. Yet neither set of findings is necessarily incorrect: Uncle Ben's may fill some of its positions by promotions while it must fill other positions from outside the company. If so, it is insufficient to know that blacks constitute 141 of Uncle Ben's 394 employees. We must know how many of those 394 employees hold jobs that ordinarily cannot be filled by promotion to decide the question of discriminatory impact.

The district court must, therefore, prepare new findings on discriminatory impact. Findings of fact 12 and 14, for example, are useless to the extent they incorporate or commingle facts about lateral hiring. First, the new findings must determine the number of Uncle Ben's jobs that were filled by promotion and the number that were filled by hiring from the outside of the Uncle Ben's work force. In essence, the absence or presence of blacks in lateral hire positions is generally irrelevant to the question of discrimination in promotion. Because the issue of discrimination in lateral hiring for desirable positions at Uncle Ben's has not been properly raised, the district court must excise facts germane to that issue from its assessment of discrimination in promotion. Second, the district court must decide whether Uncle Ben's has rebutted or discredited plaintiffs' prima facie showing that in promotions blacks are relegated to lower level jobs and are promoted at a significantly slower rate than whites. On this question, statistics comparing Uncle Ben's work force to the external labor market are irrelevant. Third, the district court also must find whether the legitimate nondiscriminatory reasons that it credited, based on a correct view of the controlling legal principles on that point, apply to any of the promotion positions and not just to the lateral hire positions. Given the peculiar nature of this case, on remand the district court will not abuse its discretion if it allows plaintiffs and Uncle Ben's an opportunity to clarify and supplement their original presentations.

The two issues of access-promotion and lateral hiring (including hiring from schools) — should be kept separate in scrutinizing statistical analyses. *Cf. Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d at 1372-73 (statistical consequences of unvalidated testing should not be manipulated by including effects of independent transferral policy). Assuming that Uncle Ben's only hired whites for non-promotion positions, only similarly situated black applicants have suffered discrimination. The class of black

laborers who are striving or would be striving but for discrimination, *International Brotherhood of Teamsters* v. *United States*, 431 U.S. at 363-64, 97 S.Ct. at 1868-1869; *James* v. *Stockham Valves & Fittings Co.*, 559 F.2d at 341-42, for a promotion from within the company to a promotion job may not have been injured. Similarly, if lateral hires were exclusively black, this would provide little solace for the class of black laborers, and would not mitigate any discrimination suffered in promotions.

VI.

[10] The trial court erred in tacitly approving the part of Uncle Ben's promotion system that is based on the use of subjective supervisory evaluations. We have repeatedly held that subjective selection processes involving white supervisors provide a ready mechanism for racial discrimination. *Parson* v. *Kaiser Aluminum & Chemical Corp.*, 575 F.2d at 1385; *James* v. *Stockham Valves & Fittings Co.*, 559 F.2d at 345; *Rowe* v. *General Motors Corp.*, 457 F.2d at 359.

Uncle Ben's subjective promotion system substantially embodies the mechanisms that we invalidated in *Rowe:*

> (i) The foreman's recommendation is the indispensable single most important factor in the promotion process.
>
> (ii) Foremen are given no written instructions pertaining to the qualifications necessary for promotion. (They are given nothing in writing telling them what to look for in making their recommendations.)
>
> (iii) Those standards which were determined to be controlling are vague and subjective.
>
> (iv) Hourly employees are not notified of promotion opportunities nor are they notified of the qualifications necessary to get jobs.
>
> (v) There are no safeguards in the procedure designed to avert discriminatory practices.

Id. at 358-59 (footnote omitted). *See Wade* v. *Mississippi Cooperative Extension Service,* 528 F.2d 508, 518 (5th Cir. 1976) (§ 1981 standard). These *Rowe* vices are not undone here simply because Uncle Ben's has made certain changes about the time this suit was instituted. Nor is *Rowe* avoided because subjective decisions are made by a group instead of an individual. *See Robinson* v. *Union Carbide Corp.,* 538 F.2d at 661-62. This is not, moreover, a case of permissible subjectivity. *Davis* v. *Board of School Commissioners,* 600 F.2d 470, 475 (5th Cir. 1979), *modified on other grounds,* 616 F.2d 893 (5th Cir. 1980).

In all likelihood, the district court did not mean to approve Uncle Ben's subjective promotion system. Rather, it probably concluded that *Rowe* was inapplicable because no resulting substantial discrimination existed. *Hester* v. *Southern Ry.,* 497 F.2d at 1381. We hold that Uncle Ben's subjective promotion system fails, unless the district court concludes in light of our instructions in Part V that blacks suffered no discriminatory impact in promotion.

VII.

If the district court finds on remand that a discriminatory impact existed, it must then reexamine its conclusions regarding whether Uncle Ben's educational requirements have been validated. Should such inquiry be necessary, it must be made in light of the following standards and principles.

[11, 12] Title VII was specifically designed to remove "artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 431, 91 S.Ct. 849, 853, 28 L.Ed.2d 158 (1971). *Cf. Miller* v. *International Paper Co.,* 408 F.2d 283, 294 (5th Cir. 1969) ("The ethic which permeates the American Dream is that a person may advance as far as his

talents and his merit will carry him.") An educational requirement for a job is lawful if it is required by "business necessity," *Griggs* v. *Duke Power Co.*, 401 U.S. at 431, 91 S.Ct. at 853-854; *Payne* v. *Travenol Laboratories, Inc.*, 565 F.2d 895, 899-900 (5th Cir.), *cert. denied*, 439 U.S. 835, 99 S.Ct. 118, 58 L.Ed.2d 131 (1978), and valid under the EEOC's Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 (1979); *see Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425, 95 S.Ct. 2362, 2375, 45 L.Ed.2d 280 (1975). *See generally Griggs* v. *Duke Power Co.*, 401 U.S. at 431-33, 436, 91 S.Ct. at 853-854.[3] An educational requirement is not a measure of probable performance for many jobs at Uncle Ben's. *See Watkins* v. *Scott Paper Co.*, 530 F.2d at 1181-82 & n. 30. This test of "justified business necessity" may, of course, be relevant, leaving aside the question of discriminatory impact, to the question on remand whether certain jobs are filled by promotion or lateral hiring.

MODIFIED AND AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

DANIEL HOLCOMBE THOMAS, District Judge, dissenting:

This writer respectfully dissents. In the course of rendering its decision the district court stated "that what has transpired . . . at Uncle Ben's could not have statistically have [sic] happened by chance," yet "[t]he law does not say that the defendant shall not violate the rules of mathematical probability." Although this and similar statements indicate the Court's confusion as to the role of statistics in cases of this sort, *e. g.*, *Fisher* v. *Proctor & Gamble Mfg. Co.*, 613 F.2d 527, 544 (5th Cir. 1980). I would affirm because, when evaluated on legally sufficient grounds, the district court's findings regarding the lack of discrimination in

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[3] In certain cases, however, if an employer has never attempted to validate an education requirement criterion, this failure to validate compels the conclusion that the requirement is invalid. *Watkins* v. *Scott Paper Co.*, 530 F.2d at 1182 n. 31.

the promotion of blacks at Uncle Ben's are not clearly erroneous. I would further conclude that the district court did not err in holding that the plaintiffs had failed to establish a *prima facie* case on all issues other than discrimination against blacks with respect to promotions. I would affirm the ruling of the district court.

I dissent.

D-1

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-1437

THOMAS JOHNSON, Individually, etc.,

Plaintiff-Appellant,

v.

UNCLE BEN'S, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Texas

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(APRIL 11, 1980)

Before VANCE and SAM D. JOHNSON, Circuit Judges and THOMAS*, District Judge.

PER CURIAM:

This appeal challenges the district court's disposition of a class action brought pursuant to 42 U.S.C. § 1981 and 42 U.S.C. § 2000e *et seq.* Suing on behalf of a class of black persons and Mexican-American persons who have been, are, or may be, employed by defendant Uncle Ben's, Inc., plaintiffs alleged in their complaint that Uncle Ben's had engaged in a variety of

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* District Judge of the Southern District of Alabama, sitting by designation.

discriminatory employment practices. Specifically, they contended that Uncle Ben's discriminated against both groups in compensation, hiring, promotion, transfer, seniority and other terms and conditions of employment. The district court, however, held that plaintiffs had failed to present a prima facie case of discriminatory treatment on any issue concerning the Mexican-Americans and on all but one issue regarding the blacks; therefore, it dismissed as to these issues at the conclusion of plaintiffs' case. The district court found that plaintiffs had established a prima facie case of discrimination in the promotion of blacks but ultimately ruled in favor of Uncle Ben's on this issue. We affirm.

In the course of rendering its decision, the district court stated "that what has transpired . . . at Uncle Ben's could not have statistically have [*sic*] happened by chance," yet "[t]he law does not say that defendant shall not violate the rules of mathematical probability." Although this and similar statements indicate the court's confusion as to the role of statistics in cases of this sort, *e.g.*, *Fisher* v. *Proctor & Gamble Mfg. Co.*, ... F.2d ... (5th Cir. 1980) [slip op. 3737, 3757], we affirm because, when evaluated on legally sufficient grounds, the district court's findings regarding the lack of discrimination in the promotion of blacks at Uncle Ben's are not clearly erroneous. We further conclude that the district court did not err in holding that plaintiffs had failed to establish a prima facie case on all issues other than discrimination against blacks with respect to promotions.

AFFIRMED.

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

THOMAS JOHNSON, Individually
and on behalf of all others
similarly situated

v.

UNCLE BEN'S INC.

CIVIL ACTION NO. 74-H-435

Nelkin & Nelkin (Carol Nelkin), Houston, Texas,
attorneys for Plaintiff.

Fulbright & Jaworski (Robert S. Bambace and
Philip J. Pfeiffer), Houston, Texas,
attorneys for Defendant.

JANUARY 11, 1978

MEMORANDUM:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff's evidence in this case was in large part a presentation of statistical analyses of various aspects of Defendant's employee-employer relationships. Defendant's statistical presentation tended to refute that of Plaintiff in some ways. However, references in these findings of fact concerning statistical significance should not be taken as a dilution of what was announced from the bench as the basis for decision at the end of the evidence:

"First, on statistics. If we accept the Plaintiff's side of the case, all that the experts say, the way I see it, is that what has transpired in the real world at Uncle Ben's could not have statistically happened by chance. We are not here to enforce a law which says that things must occur within the limits of mathematical probability. The law says the defendant may not discriminate on the basis of race. The law does not say that the defendant shall not violate the rules of mathematical probability.

"A business such as the Defendant's cannot be run successfully by chance. Decisions as to who may best serve in any given job must be made rationally by persons with sufficient knowledge of the individuals and the jobs involved to make such decisions.

"Second, having had the opportunity both to see and hear all of the witnesses in this case, I have concluded that any discrimination at Uncle Ben's has been color blind. In this case it has been between individuals without reference to race or other impermissible criterion."

FINDINGS OF FACT

1. Plaintiff Thomas Johnson was employed by Defendant Uncle Ben's, Inc. from November 8, 1964 until his discharge on November 7, 1975. Plaintiff is black.

2. Plaintiff was terminated for violating an established policy of Defendant's regarding the obligation of employees to conduct themselves in accordance with standards of common decency and morality, and specifically prohibiting the making of indecent remarks or advances. In this regard, Plaintiff was terminated for improper conduct on his part as a supervisor *vis-a-vis* a Company employee over whom he exercised supervisory authority. Plaintiff's race was not a factor in his discharge.

3. The hourly job zones within the Plant, which is where Plaintiff was initially employed, range from Zone 1 to Zone 11, with the job classifications within Zone 11 being the highest rated hourly jobs within the Company. In ascending order of pay, Defendant's Salaried Job Zones range from Zone VII to

Zone II, with certain Salaried Job Zones having subgroups such as Zone VI which is broken down into Zones VI-1 and VI-2. Defendant also has a separate job zone structure for office hourly positions, with the Office Hourly Job Zones utilized by Defendant, in ascending order of pay, ranging from Zone 1 through Zone 8.

4. During the period of his employment, November, 1964 to November, 1975, Plaintiff advanced from a job classification within Plant Hourly Job Zone 3 to Accounting Supervisor which is a Salaried Job Zone VI-2 position. From 1967 until 1974 Plaintiff was employed in a Salaried Zone VII position within the Research & Development Division. On or about March 12, 1974, prior to the filing of this action, Plaintiff accepted a transfer from Defendant's Research & Development Division to its Service and Finance Division. The Transfer offer was in response to Plaintiff's request.

5. Although Plaintiff received no promotions during the seven year period he was employed at a Salaried Job Zone VII position in Research & Development, the Court finds that Plaintiff was not treated differently than similarly situated white employees.

6. Although Plaintiff complains that several employees within the Research & Development Division did receive promotions during the time he served in a Salaried Zone VII position, there is no evidence that Plaintiff's race was a factor in any of these promotion decisions or that Plaintiff was qualified for the promotions in question.

7. Defendant did not discriminatorily fail to promote Plaintiff or otherwise discriminate against Plaintiff in his employment opportunites on the basis of his race.

8. By Order dated September 12, 1975, this action was certified as a class action maintainable by Plaintiff in his own behalf and in behalf of all other black and Mexican-American persons

who have been employed or are employed or may in the future be employed by Defendant.

9. The Court finds that Defendant's policies, practices, customs and usages at its facilities have not discriminated against Plaintiff and the class he represents on the basis of race and/or national origin with regard to hiring, job assignments, promotions, training, seniority, wages, transfers, discharge and other terms and conditions of employment.

10. Plaintiff failed to establish a pattern or practice of Defendant treating Mexican-American employees and/or applicants for employment differently than white employees and/or applicants. Plaintiff's expert witness, Dr. Richard Tapia, testified that Mexican-Americans represented 8.9% of the Houston Standard Metropolitan Statistical Area ("SMSA") labor force. While the Court finds that Mexican-Americans do represent 8.9% of the labor force within the Houston SMSA, based upon the 1970 United States Census, the Court further finds that underemployment of Mexican-Americans within Defendant's labor force was not established.

11. Plaintiff also introduced through Dr. Tapia evidence of differences in upward mobility — wage increases received by Defendant's black and white employees. See Plaintiff's Exhibit No. 8. Such evidence does not, however, when considered in conjunction with countervailing evidence of individual cases offered by Defendant, *establish discriminatory treatment of Defendant's black employees.*

12. During the period from August 8, 1971 through May 10, 1974, limiting the analysis to employees who were employed on both dates, Defendant's black employees received a statistically significant greater wage increase than did Defendant's white employees. See Defendant's Exhibit No. 31. Further, contrary to Table III.3 of Plaintiff's Exhibit No. 8, the Court finds that the percentage increase in black wages exceeded the percentage increase in white wages regardless of whether or not individuals

in job classifications falling within the EEOC category "Officials & Managers" are included. See Defendant's Exhibit No. 31. Utilizing salary level groupings suggested by Plaintiff's Exhibit No. 8, e.g., employees earning less than a given amount, any differences in black-white wage increases during the 1971-74 period were not statistically significant. See Defendant's Exhibit No. 57.

13. The Court finds that any differences in wage increases received by black and white employees, or claimed differences in upward mobility as between black and white employees, were due to specific individual attributes of Defendant's employees. Such differences were not due to the race of the employee concerned. The referenced attributes or upward mobility factors include, for example, limited ability to read, write and make numerical calculations; promotion refusals; demotion requests; non-shift work requests; lack of interest in changing jobs; and performance shortcomings.

14. As of March 31, 1974, the Defendant employed 141 blacks out of a total work force of 394 employees. Considering the job classifications utilized at Defendant's facilities and the necessary requirements for those jobs, and based on the 1970 United States Census availability data, the Court finds the Defendant employed an equitable number of blacks in view of their availability within the Houston SMSA.

15. The large number of black employees employed within Defendant's lower job zones is not the result of racial discrimination.

16. The Court finds, based upon the testimony of Dr. Richard Jeanneret, an expert in the field of industrial psychology and job analysis, that Defendant's requirements for its jobs are valid, job-related and necessary. The Court further finds that certain of Defendant's jobs require knowledge and skills not obtainable through on-the-job or internal Company training or experience.

17. The job classifications/positions within Defendant's Office differ greatly from those within its Plant. They involve and require different skills, knowledge and training.

18. Because of the Office-Plant differences, and because the lines of progression and patterns of promotion respecting wage differentials and time in grade differ significantly, statistical analyses which separate Office and Plant employees are proper and allow meaningful comparisons to be made and conclusions to be drawn. The joinder or lumping together of Office and Plant employees does not provide a meaningful or valid basis for comparing the treatment of black and white employees.

19. In terms of the number of employees promoted, their time in grade prior to promotion and the wage increases received upon being promoted, the Court finds that there has been no statistically significant difference in the treatment of Defendant's black and white employees. See Defendant's Exhibit Nos. 36, 37, 38, 39, 40, 41 and 42 (a-c).

CONCLUSIONS OF LAW

1. Any finding of fact hereinbefore made which constitutes a conclusion of law is hereby adopted as a conclusion of law.

2. The Court finds that Plaintiff Thomas Johnson failed to prove that he was discharged because of his race, or because he filed charges with the EEOC or because he instituted and failed to dismiss these legal proceedings against Defendant, or that his discharge in any manner violated Title VII or § 1981.

3. The Court finds that Defendant Uncle Ben's, Inc. did not unlawfully fail to promote Plaintiff Thomas Johnson or otherwise discriminate against him in his employment opportunities on the basis of his race in violation of either Title VII or § 1981.

4. The Court finds that Defendant Uncle Ben's, Inc.'s employment policies, practices, customs and usages at its various

facilities are non-discriminatory and have not resulted in discrimination against Plaintiff Thomas Johnson and the class he represents on the basis of race and/or national origin with regard to hiring, job assignments, promotions, training, seniority, wages, transfers, discharges and other terms and conditions of employment in violation of either Title VII or § 1981.

5. The Court further finds that all costs of suit should be and hereby are taxed against Plaintiff.

DONE at Houston, Texas, this 11th day of January, 1978.

ROSS N. STERLING
UNITED STATES DISTRICT JUDGE

F-1

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT*

No. 78-1437

THOMAS JOHNSON, Individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

UNCLE BEN'S, INC.,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

On Suggestion For Rehearing En Banc

(Opinion 9/30/81, 5 Cir., 198.., ... F.2d ....).

(December 30, 1981)

ORDER:

Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Administrative Unit having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule

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* Former Fifth Circuit case, Section 9(1) of Public Law 96-452-October 14, 1980.

16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

ROBERT VANCE
United States Circuit Judge

42 U.S.C. § 1981 provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 2000e-2 provides in pertinent part:

(a) It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * *

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin

employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

H-1

IN THE

United States Court of Appeals

FIFTH CIRCUIT.

No. 80-1935.

Feb. 22, 1982.

RILEY D. POUNCY,

Plaintiff-Appellant,

v.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Defendant-Appellee.

Black former employee brought action against employer challenging discrimination with respect to promotion and claiming retaliatory discharge. The United States District Court for the Southern District of Texas, Carl O. Bue, Jr., J., 499 F.Supp. 427, entered judgment for employer, and former employee appealed. The Court of Appeals, Reavley, Circuit Judge, held that: (1) employer showed legitimate reasons for failure to grant employee the promotion and for discharging him; (2) disparate impact model is an inappropriate vehicle from which to launch a wide ranging attack on the cumulative effect of a company's employment practices; and (3) statistical evidence did not show discriminatory treatment of blacks by the employer.

Affirmed.

1. Federal Courts — 858

Issue of whether black employee was the victim of racial discrimination is a question of ultimate fact to which the clearly erroneous rule does not apply.

2. Civil Rights — 44(1)

Evidence that white female who was chosen for promotion possessed initiative and ability to communicate with and train her coworkers which black employee did not have and that black employee was discharged due to his failure to perform a legitimate work assignment sustained determination that the black employee was not discriminated against, even if he had made a prima facie case of racial discrimination.

3. Civil Rights — 9.10

In order to establish a claim of racial discrimination under the disparate impact theory, plaintiff need only show that a facially neutral employment practice produces a significantly adverse impact on one race; prima facie case is shown by identification of a neutral employment practice coupled with proof of its discriminatory impact on employer's work force.

4. Civil Rights — 9.10

Discriminatory impact model of proof in an employment discrimination case is not the appropriate vehicle from which to launch a wide range of attack on the cumulative effect of a company's employment practices; disparate impact model applies only when an employer has instituted a specific procedure, usually a selection criterion for employment, which can be shown to have a causal connection to a class based imbalance in the work force.

5. Civil Rights — 44(1)

Identification by the aggrieved party of the specific employment practice responsible for the disparate impact is necessary so that the employer can respond by offering proof of its legitimacy.

6. Civil Rights — 44(1)

Disparate impact model requires proof of a causal connection between a challenged employment practice and the composition of the work force.

7. Civil Rights — 9.10

Black employee could not show that, independent of other factors, the employment pra..tices which he challenged had caused the racial imbalance in the employer's work force, he could only show that blacks were overrepresented in the lower levels of the work force and he could not use the disparate impact theory to challenge employer's promotion practices.

8. Civil Rights — 43

Statistical evidence may be used to show both a motive and a pattern or practice of racial discrimination.

9. Civil Rights — 43

In a proper case, court may infer racial discrimination if a gross statistical disparity in the composition of an employer's work force can be shown.

10. Civil Rights — 44(4)

Evidence that the mean weekly salaries of black employees who had been employed for five years were lower than the mean weekly salaries of white employees who had been employed for the same length of time did not show discrimination in promotion.

11. Civil Rights — 44(1)

Statistical proof insufficient to prove discrimination under a disparate impact theory is, by definition, also inadequate to show discrimination under a disparate treatment theory.

12. Civil Rights — 44(4)

Statistical evidence showing that black employees receiving promotions had greater mean number of years of service with the employer than did white employees did not show discriminatory treatment.

13. Civil Rights — 44(4)

Statistical evidence showing the mean number of years of service with the employer for employees, by race, and showing that black employees were employed longer than white employees before being promoted to each level did not show discriminatory treatment.

Appeal from the United States District Court for the Southern District of Texas.

Before GEE, GARZA and REAVLEY, Circuit Judges.

REAVLEY, Circuit Judge:

This is a discrimination case in which the employer defendant has prevailed and will now prevail again. Notwithstanding the voluminous record constructed by the parties in the district court and the extensive findings of fact and conclusions of law entered by the district judge,[1] our decision in this appeal involves little more than the straightforward application of well settled

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[1] The exhaustive findings of fact and conclusions of law of the district judge have been published. *See Pouncy* v. *Prudential Ins. Co. of America*, 499 F.Supp. 427 (S.D.Tex. 1980). Rather than "add nothing but useless pages to the law reports by spelling out the facts carefully delineated by the district judge," *Flowers Transp., Inc.* v. *M/V Peanut Hollinger*, 664 F.2d 112, 113 (5th Cir. 1981), throughout this opinion we liberally refer to the trial judge's findings. In doing so, we do not place our imprimatur on his legal analysis. As will be seen, not only did the district judge's analysis extend beyond what was necessary to decide the appellant's claims, but, like the parties, the trial judge incorrectly employed a disparate impact analysis in deciding classwide claims of disparate treatment.

principles of employment discrimination law, chosen from our extensive writings, to a handful of subsidiary findings of fact over which there is no dispute. As a result, several issues raised in this appeal, principally those concerning the use of multiple regression and other sophisticated computer assisted models, require no attention.

I. *Procedural History*

Claiming that he was the victim of impermissible employment discrimination, Riley D. Pouncy ("Pouncy" or "the appellant"), a black, brought an action against his employer, The Prudential Insurance Company of America ("Prudential" or "employer").[2] His complaint contained two claims.[3] One, that Prudential had discriminated against him in 1975 when it promoted a coworker, Olga Aschenbeck, a white, to the position of assistant supervisor in the duplicating section of the office services division at Prudential's Southwestern Home Office in Houston, Texas. The other, that Prudential had discriminated against its black employees as a class by systematically failing to promote them within its work force and otherwise affording them the same conditions of employment as given to whites. A third issue — that the appellant was discharged in retaliation for filing a charge with the EEOC — was raised at trial.[4]

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[2] When this action was filed in the district court on October 31, 1975, Pouncy was employed by Prudential. Prudential terminated Pouncy's employment on May 3, 1977. 499 F.Supp. at 433.

[3] The appellant's employment discrimination action included claims that Prudential had violated both Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and 42 U.S.C. § 1981. Even though violations of two separate statutes were alleged, the elements of a substantive cause of action for racial discrimination in employment are identical under both statutes. *Rivera* v. *City of Wichita Falls*, 665 F.2d 531, 534 n.4 (5th Cir. 1982). Accordingly, we employ only one analysis in evaluating the appellant's claims of racial discrimination.

[4] In addition to the appellant's claims that Prudential had discriminated against its black employees as a class and had discriminated against him by promoting a coworker, Pouncy claimed

The district judge provisionally certified the plaintiff class to include all present and future black employees, other than part-time employees, wage band employees, and commissary workers, in the administrative section at Prudential's Houston office, *Pouncy* v. *Prudential Insurance Co. of America*, 499 F.Supp. 427, 431 (S.D.Tex. 1980); *see also id.* at 422-45. After a 13 day trial limited to the issue of liability, in which both parties offered anecdotal, documentary, and statistical evidence, the district judge found *inter alia* that Pouncy had not been denied the promotion to assistant section supervisor due to his race, that Pouncy's subsequent discharge by Prudential was not in retaliation for filing his charge of employment discrimination with the Equal Employment Opportunity Commission, and that Prudential had not maintained a system of promotion or advancement that had discriminated against blacks as a class. *Id.* at 466-67.

In this appeal, Pouncy raises two contentions. First, he disputes the district judge's conclusion that he was not the victim of racial discrimination. Second, he argues that the statistical evidence presented through his two expert witnesses coupled with the other evidence demonstrates that Prudential treats blacks, as a class, less favorably than whites.[5]

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at trial that his discharge, which occurred subsequent to the proceedings before the EEOC, was in retaliation for filing a charge with the Equal Employment Opportunity Commission. 499 F.Supp. at 435. Pouncy, however, neither filed another charge with the EEOC to claim that his discharge was in retaliation for filing the earlier EEOC charge nor amended his complaint to state a claim of retaliatory discharge. Nevertheless, as both parties consented to the trial of this issue, *id.* at 435-36, and it grew out of an EEOC charge properly before the trial court, the district court had jurisdiction to hear it. *See Gupta* v. *East Texas State Univ.*, 654 F.2d 411 (5th Cir. 1981).

[5] A third issue briefed by both the appellant and Prudential involves the inclusion in, or the exclusion from, the statistics of those employees hired by Prudential prior to the effective date of Title VII. The district judge discussed this issue and agreed with Prudential's analysis. 499 F.Supp. at 445. We do not discuss this issue for,

We hold that the subsidiary findings of fact made by the district judge lead to the conclusion that Pouncy was neither the victim of racial discrimination by his employer nor received a retaliatory discharge. We also hold that the appellant's evidence on the class claims, mostly statistics, failed to show that Prudential's black employees were treated differently than white employees in terms of promotions, compensation, and in their use throughout Prudential's work force.

II. *Individual Claims*

The district judge predicated his decision that the appellant had not been the victim of racial discrimination on two grounds. First, he concluded that Pouncy had not established a prima facie case of discrimination since he was not qualified for the promotion to assistant supervisor in the duplicating section. *Id.* at 433-34, 466. "Although he had achieved technical proficiency in his performance in the duplicating section," the district judge found that Pouncy "lacked the necessary communication, leadership and training skills to perform as a supervisor." *Id.* at 434. Alternatively, the district judge held that even if a prima facie case had been proved, Prudential had established that the decision to promote Olga Aschenbeck rather than the appellant was made for non-racial reasons and the appellant "failed to satisfy [his] ultimate burden of establishing that he was discriminated against on the basis of his race." *Id.* at 435.

Likewise, the district judge anchored his decision that the appellant was not discharged in retaliation for filing a charge with the EEOC both on Pouncy's inability to make out a prima facie case and, alternatively, on finding that Prudential "ha[d] adequately rebutted plaintiff's case by proving that plaintiff's termination was based on a legitimate, non-discriminatory

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as will be seen, the appellant's statistical presentation was so unrelated to whether Prudential discriminated against its black employees that, no matter what employees were either included or excluded from the statistics, nothing was proved.

reason." *Id.* at 467. According to the district judge, Pouncy either did not establish that he was discharged "for an infraction for which non-minorities were not," or, assuming a prima facie case had been made, "failed to sustain the inference that his discharge was the result of racial discrimination." *Id.* at 437, 438.

[1] The ultimate issue—whether the appellant was the victim of racial discrimination—is a question of ultimate fact to which the clearly erroneous rule does not apply. *Cousin v. Board of Trustees*, 648 F.2d 293, 296 & n.3 (5th Cir. 1981). Otherwise, our review of the district court's subsidiary findings is constrained by the clearly erroneous standard. *Id.* at 295. "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948).

[2] We see no reason to decide whether Pouncy established a prima facie case of discrimination since it is clear from the district judge's findings that as a plaintiff Pouncy was unable to overcome Prudential's evidence and discharge "the ultimate burden of persuading the court that [he had] been the victim of intentional discrimination." *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 256, 101 S.Ct. 1089, 1095, 67 L.Ed.2d 207 (1981). The record fully supports Judge Bue's finding that Olga Aschenbeck was chosen as assistant supervisor of the duplicating section for a legitimate, nondiscriminatory reason. She, unlike Pouncy, possessed initiative and the ability to communicate with and train her coworkers. Equally supported by the evidence is the district judge's conclusion that Pouncy was discharged due to his failure to perform a legitimate work assignment: to rewrite a memorandum received from Prudential's corporate office. As in most individual Title VII actions that reach trial, the issue of racial discrimination was in hot

dispute. The district judge was charged with the task of finding the facts. Given the findings that he made, the conclusion that Pouncy was not the victim of racial discrimination is inescapable.

III. *Class Claims*

In the district court, Pouncy presented four sets of statistics to show that Prudential discriminated against its black employees. First, he presented evidence showing that for employees hired between 1973 and 1977 the mean weekly salary of white employees was greater than the mean weekly salary of black employees hired in the same year. *See* 499 F.Supp. at 449. The appellant also introduced evidence showing that in each year from 1973 to 1975, the percentage of blacks receiving promotions to managerial and supervisory positions was less than the percentage of blacks comprising Prudential's total work force. *See id.* at 454. For each year from 1973 to 1977, Pouncy demonstrated that, with one exception in 1975, prior to promotion to levels 5 through 12, black employees had a greater mean number of years of service with Prudential than did white employees. *Id.* at 454-55. Lastly, Pouncy introduced evidence showing that from 1973 to 1975 blacks were clustered in the lower levels of Prudential's work force and "underrepresented in upper levels of [Prudential's] workforce when compared with their percentage in [Prudential's] total workforce and with the workforce as a whole." *Id.* at 459.

Pouncy argued that three of Prudential's employment practices were responsible for the disparities shown in his statistics. First, he complained that job vacancies at Prudential were not "posted" or otherwise made known to the employees. Rather, managers and other supervisory personnel, a majority of whom were white, selected employees for promotion using minimal objective criteria. Pouncy also complained that Prudential's level system, through which clerical employees often are hired at entry level positions and subsequently promoted through the

employer's work force into better jobs,[6] retains black employees at the lowest paying and least skilled jobs. Lastly, Pouncy singled out Prudential's use of subjective criteria in employee performance evaluations.

A. *The Disparate Impact Model*

By structuring his case to establish that three of Prudential's employment practices accounted for the disparities in the racial composition of Prudential's work force, the appellant attempted to fit his proof into the disparate impact model of an employment discrimination case. This theory of recovery under Title VII is used to attack employment selection criteria that are facially neutral yet fall more harshly on a protected class of employees. *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 335 n.15, 97 S.Ct. 1843, 1854 n.15, 52 L.Ed.2d 396 (1977). Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude [blacks] cannot be shown to be related to job performance, the practice is prohibited." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431, 91 S.Ct. 849, 853, 28 L.Ed.2d 158 (1971).

[3] In order to establish a claim of racial discrimination under this theory, a plaintiff need only show that a facially neutral employment practice produces a significantly adverse impact on one race. *Dothard* v. *Rawlinson*, 433 U.S. 321, 329, 97 S.Ct. 2720, 2726, 53 L.Ed.2d 786 (1977). The employer's intent to discriminate against a class of employees is not at issue.[7] When coupled with an identifiable employment practice,

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[6] Prudential's level system is fully described in the findings and conclusions of the district judge. *See id.* at 446.

[7] "[E]mployment practices which operate to discriminate against people because of their race . . . violate Title VII, even though the practices are fair on their face and even though the employer had no subjective intention to discriminate." *Rowe* v. *General Motors*, 457

neutral in form but discriminatory in operation, statistics that show a significant disparity in an employer's work force raise "an inference that employment decisions are tainted by intrusion of illegitimate concerns." *Rivera* v. *City of Wichita Falls*, 665 F.2d 531, 535 (5th Cir. 1982). A prima facie case is shown by identification of a neutral employment practice coupled with proof of its discriminatory impact on the employer's work force. *Johnson* v. *Uncle Ben's, Inc.*, 657 F.2d 750, 753 (5th Cir. 1981).

[4] The discriminatory impact model of proof in an employment discrimination case is not, however, the appropriate vehicle from which to launch a wide ranging attack on the cumulative effect of a company's employment practices. Nor may just any employment practice be challenged under this model simply because an uneven racial balance exists in an employer's work force. As originally conceived in *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 an action in which a group of black employees challenged their employer's requirement of a high school diploma and a satisfactory score on two aptitude tests for positions in several departments of a power generating facility, the disparate impact theory applied to an "overt, clearly identified nondiscretionary selection criteri[on] that [was] applied at a single point in a selection process." D. Baldus & J. Cole, Statistical Proof of Discrimination §1.23, at 12 (1981 Supp.). Although some courts have used the disparate impact model of proof to challenge multiple employment practices simultaneously, *see id.*, this is an incorrect use of the model. The disparate impact model applies only when an employer has instituted a specific procedure, usually a selection criterion for employment, that can be shown to have a casual connection to a class based imbalance in the work force. Thus, a disparate

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F.2d 348, 355 (5th Cir. 1972). As the Supreme Court has explained, "good intent or absence of discriminatory intent does not redeem employment procedures . . . that operate as 'built-in headwings' [sic] for minority groups." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432, 91 S.Ct. 849, 854, 28 L.Ed.2d 158 (1971).

impact analysis may be used to challenge aptitude and intelligence tests, *see Griggs*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158, educational requirements, *see id.*, height and weight requirements, *see Dothard*, 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977), an employer's refusal to employ persons who use methadone, *see New York City Transit Authority* v. *Beazer*, 440 U.S. 568, 99 S.Ct. 1355, 59 L.Ed.2d 587 (1979), who have a poor credit rating, *see* 3 A. Larson & L. Larson, Employment Discrimination §73.00 (1981 & 1981 Supp.), or who have a record of arrests, *see id.*, so long as a resulting disparate impact may be shown.

[5] We require proof that a specific practice results in a discriminatory impact on a class in an employer's work force in order to allocate fairly the parties' respective burdens of proof at trial. The aggrieved party must prove a disparate impact due to the selection procedure. The employer then has the burden of proving that the selection procedure is justified by a legitimate business reason.[8] *Johnson*, 667 F.2d at 753. Identification by the aggrieved party of the specific employment practice responsible for the disparate impact is necessary so that the employer can respond by offering proof of its legitimacy. "Knowledge of a legitimate business reason is uniquely available to the employer who is . . . required to persuade the court of its existence by a preponderance of the evidence." *Id.* We do not permit a plaintiff to challenge an entire range of employment practices merely because the employer's work force reflects a racial imbalance that might be causally related to any one or more of several practices for to do so

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[8] Other than proving that the challenged employment practice is necessary for the performance of the job, the employer may also rebut the prima facie case with evidence showing "the total unacceptability of [the] plaintiff's statistical proof." *Johnson* v. *Uncle Ben's, Inc.*, 628 F.2d 419, 424 (5th Cir. 1980), *vacated on other grounds*, — U.S. —, 101 S.Ct. 1967, 68 L.Ed.2d 290 (1981); *accord, Rivera*, 665 F.2d at 535.

> would allow the disparate impact of one element to require validation of other elements having no adverse effects. The burden of determining the validity of a screening procedure, weighing not only on the employer but also on the limited resources of the district court, will not be imposed where proof of an absence of discriminatory effect attributable to the procedure shows it to be unwarranted.

Rivera, 665 F.2d at 539.

As we have noted, at trial the appellant tailored his proof on the class claims to fit the disparate impact model. The findings and conclusions of the district judge also reflect the use of the disparate impact analysis. On appeal, both sides have briefed the class claims as presenting a disparate impact case. We conclude, however, that the proof adduced at trial does not fit the disparate impact model. Even if we accept all of the appellant's statistics as accurately reflecting the condition of black employees in Prudential's work force, a step the district judge was unwilling to take, it is clear that Pouncy has not shown that a facially neutral employment practice used by Prudential falls more harshly on black employees.

None of the three Prudential "employment practices" singled out by the appellant—the failure to post job openings, the use of a level system, and evaluating employees with subjective criteria—are akin to the "facially neutral employment practices" the disparate impact model was designed to test. Unlike educational requirements, aptitude tests, and the like, the practices identified by Pouncy are not selection procedures to which the disparate impact model traditionally has applied. *See* 3 A. Larson & L. Larson, Employment Discrimination §73.00 (1981 & 1981 Supp.).

[6] Moreover, the appellant cannot make a showing that the Prudential employment practices that he has identified have caused the racial imbalance in Prudential's work force. The disparate impact model requires proof of a causal connection between a challenged employment practice and the composition

of the work force. Aptitude tests, height and weight requirements, and similar selection criteria all may be shown to affect one class of employees more harshly than another by controlling for the impact of the employment practice on one class in the employer's work force so that it can be measured. For example, in *Griggs* the plaintiff proved not just a racial imbalance in the employer's work force, but also that the employer's educational requirement resulted in disqualifying a higher percentage of black employees than white employees. 401 U.S. at 430 n.6, 91 S.Ct. at 853 n.6. In an action challenging an employer's height and weight requirements, the plaintiff demonstrated that, as compared to men, a disproportionate number of women were automatically disqualified from obtaining jobs as corrections counselors. *Dothard*, 433 U.S. at 329-30 & n.12, 97 S.Ct. at 2726-2727 & n.12.

[7] By contrast, Pouncy has not shown, nor can he show, that independent of other factors the employment practices he challenges have caused the racial imbalance in Prudential's work force. The statistics presented by the appellant do show that, on the whole, blacks are overrepresented in the lower levels of Prudential's work force. But this might result from any number of causes. Absent proof that the disparate impact is caused by one or more of the challenged employment practices, we do not require the employer to justify the legitimacy of any (or all) employment practices. In sum, the nature of the evidence presented by the appellant at trial could not establish a case of employment discrimination based on the disparate impact model.

B. ***The Disparate Treatment Model***

Although the appellant structured his evidence to fit a disparate impact case, a review of the record makes clear that Pouncy also claimed that Prudential discriminated against its black employees by treating them differently from its white

employees. Thus, the appellant also attempted to prove a class-wide disparate treatment case. In contrast to a disparate impact case, motive must be proved in a disparate treatment case. *Wilkins* v. *University of Houston*, 654 F.2d 388, 395 (5th Cir. 1981). Moreover, to succeed in a disparate treatment case, Pouncy "had to prove more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts. [He] had to establish by a preponderance of the evidence that racial discrimination was the company's standard operating procedure — the regular rather than the usual practice." *Teamsters*, 431 U.S. at 336, 97 S.Ct. at 1855 (footnote omitted).

[8, 9] Statistical evidence is also of central importance in a disparate treatment case. It may be used to show both motive and a pattern or practice of racial discrimination. In a proper case, we may infer racial discrimination if gross statistical disparities in the composition of an employer's work force can be shown. *Id.* at 335 n.15, 97 S.Ct. at 1854 n.15. When "the statistical showing is sufficiently strong in a disparate treatment action, [the] plaintiffs' prima facie case can be made without additional evidence establishing that [the] defendant purposefully treated minorities protected under Title VII less favorably than other persons." *Wilkins*, 654 F.2d at 395.

Statistical evidence, however, must be meaningful.

> Because of the significant role that statistics can play in discrimination cases and of their inherently slippery nature, it is imperative that they be used properly. While gross statistical disparities may alone establish a prima facie case of employment discrimination in a proper case, the Supreme Court has cautioned "that statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances."

Id. (quoting *Teamsters*, 431 U.S. at 340, 97 S.Ct. at 1857). With this caveat in mind, we advert to the statistical evidence comprising the appellant's case.

1. Salary Evidence

The appellant introduced a series of exhibits comparing the mean salary of Prudential employees hired in 1973 through 1978 and still on the payroll in 1978. The exhibits were prepared by selecting from a 1978 list of Prudential employees all black employees hired in 1973. The weekly salaries of these employees were added together and the sum was then divided by the number of employees producing a mean salary for a black employee at Prudential hired in 1973 and still with Prudential 5 years later. This process was repeated for white employees and black employees hired in each year, 1973 through 1978 inclusive, and still with Prudential. This exercise showed that when compared to black employees hired in the same year, white employees had a greater mean weekly salary. *See* 499 F.Supp. at 449.

[10, 11] The district judge characterized the appellant's series of exhibits as "a naked comparison of average weekly salaries without regard to level of skill, education and training [from which n]o meaningful conclusion can be drawn," "much less a *prima facie* case."[9] *Id.* We agree. The appellant's statistical evidence is deficient because it "fails to take into account the fact that a number of factors operate simultaneously to influence the amount of salary [an employee] receives." *Wilkins*, 654 F.2d at 402. The discrepancies between the mean salary of black

[9] Although the district judge was mistaken in analyzing the appellant's evidence using a disparate impact model of proof, his conclusions that Pouncy's statsitical evidence did not establish a case of employment discrimination are still of assistance to us in reviewing the evidence. Statistical proof insufficient to prove discrimination under a disparate impact theory is, by definition, also inadequate to show discrimination under a disparate treatment theory. *Rivera*, 665 F.2d at 535 n.5.

employees and the mean salary of white employees hired in specific years may be explained by any number of nondiscriminatory factors. Different job levels, different skill levels, previous training, and experience: all may account for unequal salaries in an environment free of discrimination. The appellant's exhibits make the baseless assumption that the mean salary of employees, by race and by year hired, should be equal regardless of the level at which the employee originally was hired. Under the appellant's analysis, an attorney hired at level 20 with a salary of $20,000 would be compared with a file clerk of a different race with a salary of $6,500 if both were hired in the same year. From this inconclusive evidence we are unable to hold that Prudential's black employees, as a class, were the victim of employment discrimination.[10]

2. Promotion Evidence

[12] The appellant also introduced two series of exhibits focusing on the allocation of promotions within Prudential's work force. One series of exhibits revealed that, with few exceptions, in each year from 1973 to 1975 the percentage of black employees receiving promotions to supervisory and managerial positions, levels 10 through 84, was less than the percentage of blacks in Prudential's work force. The other series of exhibits showed that, with one exception in 1975, when comparing, by race, employees promoted to levels 5 through 12 in the years from 1973 to 1977, black employees had a greater mean number of years of service with Prudential than white employees. The district judge was persuaded by neither of the appellant's series of exhibits that Prudential discriminated against its black employees in awarding promotions.[11] 499 F.Supp. at 455. We

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[10] Because we hold that the appellant's salary evidence does not show that Prudential treated its black employees differently than it treated its white employees, we do not review the probative value of Prudential's salary evidence. *See* 499 F.Supp. at 455-58.

[11] See note 9 *supra*.

agree with the district judge that the appellant's promotional evidence does not demonstrate that Prudential has discriminated impermissibly against its black employees.

The series of exhibits that show the percentage of employees, by race, promoted to managerial and supervisory positions at Prudential in each year were prepared simply. The number of promotions to each level, from level 10 to 82, for each year from 1973 to 1975, were tallied. Then, each sum was analyzed to determine the number of white employees and the number of black employees receiving a promotion to that level that year. Percentages of white employees and black employees were then calculated.

Although the percentage of black employees that had received promotions to levels 10 through 82 generally is far less than the percentage of black employees in Prudential's work force, we refuse to infer that Prudential treated its black employees less favorably in awarding promotions. The appellant's argument that this evidence demonstrated that Prudential discriminated against its black employees in promotions says nothing of the required comparison to a qualified pool of employees presumptively eligible for promotion. *See Wilkins,* 654 F.2d at 401. Instead, the appellant makes the baseless assumption that *all* employees are equally qualified for *all* positions — an assumption specifically rejected by the district judge as not supported by the evidence. 499 F.Supp. at 454.

[13] The appellant's other series of exhibits on promotions at Prudential was prepared by finding the sum of the number of years of service at Prudential for each employee, by race, promoted to each level, 5 through 12, at the time of promotion. These sums were then divided by the number of employees, by race, promoted to the different levels. The resulting statistic — the mean number of years of service at Prudential for employees, by race, at each level — indicated that, with one exception,

black employees were employed by Prudential longer than white employees before being promoted to each level.

Like the district judge, we refuse to infer from this presentation that Prudential's black employees are disfavored in promotions.

> [T]his exhibit does not reflect the level of hire of the employees whose promotion rates are compared. Such an omission could result in misinterpretation of data. As an example, [the exhibit] indicates that Blacks averaged 7.16 years of service prior to promotion [to level 9 in 1975]. But if these same white employees had been college hires (hired in at level 8) and had taken an average of 5.8 years to advance one level, and the black employees had been entry level hires (level 2) and had required an average of 7.16 years to advance 7 levels, the same data would indicate that Blacks actually enjoyed a more rapid rate of advancement than Whites.
>
> Thus, as defendant's expert testified and as these contrasting results demonstrate, no conclusions can be drawn from such an analysis of years prior to promotion, without more, because its results cannot be attributed to any one cause — in this instance, it cannot be determined whether a certain number of years prior to promotion results from the relative level of hire or rate of promotion.

499 F.Supp. at 455 (footnotes omitted). We previously have suggested that the mean length of time between promotions may be relevant in proving discrimination. *Wilkins*, 654 F.2d at 402. But that was not proved in this case. The appellant's evidence on promotions did not establish that Prudential's black employees were the victims of disparate treatment.[12]

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[12] Because we hold that the appellant's promotion evidence does not show that Prudential discriminated against its black employees, we do not review the probative value of Prudential's promotion evidence. *See* 499 F.Supp. at 449-53.

3. Utilization Evidence

The district judge held that the appellant's utilization statistics, fully described in his findings, *see* 499 F.Supp. at 459, established a prima facie case of employment discriminaton, *see id.* He went on to conclude, however, that Prudential's " 'more refined, accurate and valid statistics,' " *id.*, reflecting a gradual but steady increase in the percentage of black employees in all levels of Prudential's work force, was "inconsistent with any policy of discrimination during the time period relevant to this lawsuit," *id.* at 460.

In this appeal, Prudential argues that the appellant's utilization statistics did not make out a prima facie case of employment discrimination. We see, however, no reason to decide this question for, whether or not a prima facie case was established, and no matter what burden, if any, shifted to Prudential, it is abundantly clear, considering the evidence that the number of percentage and black employees steadily increased in all levels of Prudential's work force, *see id.* at 459-61, that on the issue — whether Prudential had discriminated against its black employees — the district judge was justified in concluding as he did.[13] *See Movement for Opportunity and Equality* v. *General Motors Corp.*, 622 F.2d 1235, 1245 (7th Cir. 1980). Likewise, any claim of the appellant that his utilization evidence mandated a finding of discrimination is similarly without merit.

IV. Conclusion

Two recent decisions of this court have closed by sounding a word of caution to those who would enter the courthouse armed with statistics that prove little more than a litigant's resourcefulness manipulating numbers. *See Rivera*, 665 F.2d at 547; *Wilkins*, 654 F.2d at 410. We would add nothing by repeating

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[13] Because we rely on evidence that black employees have increased both in number and in percent in all levels of Prudential's work force, it is unnecessary for us to consider the validity of Prudential's computer model. *See* 499 F.Supp. at 461-64.

that warning again. Instead, we note only that from the inconclusive statistical evidence presented during the trial of this action, even without much of the exotic presentation of the defendant, the district judge hardly could have found other than he did.

The judgment of the district court is AFFIRMED.

Opposition

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No. 81-2026

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNCLE BEN'S, INC.

Petitioner,

v.

THOMAS JOHNSON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court below correctly remanded the case for further findings of fact on whether there was a disparate impact in the promotion of blacks.

2. Whether the Court below correctly applied the disparate impact theory to an employment promotion system that was based in part on a neutral requirement that candidates complete a specified educational level.

3. Whether the Court below correctly held that, once the plaintiff establishes a *prima facie* case of disparate impact, the burden of going forward rests with the defendant to prove that the employment criteria is required by business necessity.

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR THE RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

Thomas Johnson, plaintiff-respondent (hereinafter "plaintiff"), brought this class action on March 28, 1974, alleging that Uncle Ben's, Inc. (hereinafter "Uncle Ben's" or "defendant") had discriminated against him and all similarly situated blacks and Mexican-Americans in violation of 42 U.S.C. §1981 and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* He sought injunctive, declaratory, and compensatory relief to redress Uncle Ben's discriminatory practices with respect to compensation, hiring, promotion, transfer, seniority, and other terms and conditions of employment.

At the trial in October 1977, plaintiff and other Uncle Ben's employees described the disparate impact of de-

fendant's employment policies on minorities. Plaintiffs presented expert statistical testimony by Dr. Richard Tapia that black employees received significantly fewer promotions than comparable white employees and that Mexican-Americans were significantly under-represented in defendant's work force when compared with their representation in the Houston area's labor pool.

At the conclusion of plaintiffs' direct case, defendant moved for dismissal of all allegations. The motion was granted as to all issues of Mexican-American employment, and as to the compensation, hiring, transfer, seniority, and other employment terms and conditions of blacks. The court did find, however, that plaintiffs had established a *prima facie* case of discrimination in the promotion of blacks.

Defendant called its personnel manager and three experts in an effort to rebut plaintiffs' *prima facie* showing. These experts compared Uncle Ben's employment of blacks with the utilization of blacks in allegedly comparable Bureau of the Census job classifications within the Houston Standard Metropolitan Statistical Area. One expert also analyzed promotion data for whites and blacks using very small job categories for his comparison. Finally, defendant's expert criticized Dr. Tapia for certain minor statistical discrepancies. In rebuttal, plaintiffs' statistician, Dr. Robert Thrall, testified that the small sample used by defendant's experts was unreliable and that there were significant differences in promotion rates between whites and blacks when adequate samples were used.

At the conclusion of plaintiffs' direct examination but before defendant had been allowed to cross-examine, the district court ruled for defendant from the bench. In a prepared oral statement, the court rejected all statistical analyses as fundamentally irrelevant. It concluded that "any discrimination at Uncle Ben's has been color blind" and "without reference to race or other impermissible

criterion" (Pet. App. E-2). Judge Sterling subsequently entered written findings of fact and conclusions, prefacing them with a reiteration of his oral denunciation of the use of statistics in an employment discrimination case. Final judgment was entered for defendant on January 13, 1978.

The Fifth Circuit initially affirmed the district court's opinion *per curiam* on April 11, 1980. On rehearing, however, it modified and affirmed the district court's opinion in part and reversed in part and remanded. The court affirmed the district court's dismissal of plaintiffs' allegations of discrimination against Mexican-Americans but modified the lower court's judgment to find that dismissal to be without prejudice (Pet. App. C-9). The court then held that the district court applied an "erroneous notion of the controlling legal principles regarding the use and role of statistics in an employment discrimination case" (Pet. App. C-5). The Fifth Circuit analyzed the facts within the context of the discriminatory impact theory of employment discrimination (Pet. App. C-17). It found the district court's findings inadequate because they failed to identify the relevant labor pool for promotions at Uncle Ben's and, thus, precluded the court from evaluating the discriminatory impact of defendants' promotion practices (Pet. App. C-14). The court therefore remanded the case for an assessment of the discriminatory impact based upon employment statistics that distinguished internal promotion from lateral hiring (Pet. App. C-15). The Fifth Circuit suggested that the district court might allow the parties an opportunity on remand to clarify and supplement their original presentations (Pet. App. C-15). Finally, the court also remanded for additional findings on whether Uncle Ben's educational requirement was required by "business necessity" (Pet. App. C-18).

This Court granted the defendant's first Petition for Writ of Certiorari on April 20, 1981, and vacated the

decision of the Fifth Circuit. The case was remanded for further consideration in light of the Court's holding in *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981).

The Fifth Circuit, after careful review of its earlier decision, determined that "[t]he present case involves charges of *disparate impact*. On remand, the respective burdens of plaintiffs and defendant are thus unaffected by Burdine" (Pet. App. A-7) (emphasis supplied). Following this Court's holding in *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977), the Fifth Circuit reaffirmed its decision that on remand to the district court, more detailed findings of fact were required to assess the full disparate impact of Uncle Ben's promotion criteria and that Uncle Ben's must prove that its promotion requirements have "a manifest relationship to the employment in question" (Pet. App. A-5) (quoting *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 432 (1971)).

REASONS FOR DENYING THE WRIT

I. THE FIFTH CIRCUIT CORRECTLY REMANDED THE CASE TO THE DISTRICT COURT FOR FURTHER DETERMINATIONS OF FACT.

A. Resolution of Plaintiffs' Claims of Discrimination Requires Development of a More Complete Factual Record.

The essence of plaintiffs' complaint is that Uncle Ben's promotion system, although on its face based on neutral criteria, impacts in a disproportionate and discriminatory way on black employees. The Fifth Circuit found that the elements of that system were (1) reliance on an education requirement for promotion to upper-level positions; (2) vague and subjective promotion requirements; (3) administration of promotion procedures by unsupervised, predominantly white personnel and management employees; and (4) failure to provide lower echelon employees with notice of promotion opportunities within the company (Pet. App. C-16-18).

Plaintiff's case of discriminatory impact must be returned to the district court for further evidentiary proceedings. At the original trial, the district court failed to make findings on the most crucial factual issue—whether there was a discriminatory impact on blacks' promotion opportunities using a properly defined promotion pool (Pet. App. C-14). The Fifth Circuit correctly noted that there was no determination of which labor pools supplied lower-level employees, or whether defendant filled higher level positions from internal labor sources or through lateral hiring (Pet. App. C-14-16). These factual considerations are essential to the determination of the discriminatory impact of defendant's practices on black employees.

Further trial proceedings are also necessary to decide the question of whether defendant's use of education requirements in making promotions is justified by valid business reasons. At trial, testimony established that Uncle Ben's requires specific degrees or formal courses to perform many jobs at the plant and that educational prerequisites were emphasized in the promotion process. The appellate court correctly returned the case to the district court for a reexamination of its conclusions about the validity of this requirement in light of its findings on discriminatory impact.

B. There Is No Conflict Within Or Without the Fifth Circuit That the Claims in *Johnson* Raise Issues of Disparate Impact.

Contrary to defendant's contentions, the Fifth Circuit correctly analyzed plaintiffs' allegations under the standards for a disparate impact case. Uncle Ben's employees were passive members of a system where promotions were predicated on unvalidated educational requirements, nonspecific performance standards, and subjective evaluations by the candidates' present and prospective supervisors. Promotion systems embodying similar procedures have been consistently condemned by courts where they

impact unfairly on minority employees. *See Fisher* v. *Proctor & Gamble Manufacturing Co.*, 613 F.2d 527 (5th Cir. 1980), *cert. denied*, 449 U.S. 1115 (1981); *Rowe* v. *General Motors Corp.*, 457 F.2d 348 (5th Cir. 1972); *Sledge* v. *J.P. Stevens & Co.*, 585 F.2d 625 (4th Cir. 1978), *cert. denied*, 440 U.S. 981 (1974); *James* v. *Stockham Valves & Fittings Co.*, 559 F.2d 310 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978); *EEOC* v. *Radiator Specialty Co.*, 610 F.2d 178 (4th Cir. 1979).

The recent decision of a different Fifth Circuit panel in *Pouncy* v. *Prudential Insurance Company of America*, 668 F.2d 795 (5th Cir. 1982), does not conflict with the court's treatment of the claims in *Johnson* under the disparate impact theory. The discriminatory hiring practices alleged in *Pouncy* contained none of the educational requirements that are present in the instant case. *Id.* at 799. Thus, the panel in *Pouncy* appropriately treated plaintiffs' class claims that blacks were hired only for the lowest paying or least skilled jobs under the disparate treatment model. *Id.* at 801-02.

Moreover, the *Pouncy* panel cited *Johnson* favorably in its description of the disparate impact model: "[a] *prima facie* case is shown by identification of a neutral employment practice coupled with proof of its discriminatory impact on the employer's work force. *Johnson* v. *Uncle Ben's, Inc.*, 657 F.2d 750, 753 (5th Cir. 1981)." *Id.* at 800. Far from "ignoring" the decision in *Johnson* as defendant suggests (Pet. 18), the Fifth Circuit panel that decided the Pouncy case expressly approved *Johnson*, and thereby implicitly distinguished its facts from those in *Pouncy*. Such a clear delineation between the disparate treatment claims in *Pouncy* and *Johnson's* disparate impact charges presents no analytic dilemma for future courts within that circuit.

Similarly, the cases cited by defendant from other appellate jurisdictions are inapposite to the Fifth Circuit's decision in *Johnson*. None of the plaintiffs in

St. Marie v. *Eastern Railroad Association*, 650 F.2d 395 (2d Cir. 1981), *Croker* v. *Boeing Co.*, 662 F.2d 975 (3d Cir. 1981), *Taylor* v. *Teletype Corp.*, 648 F.2d 1129 (8th Cir. 1981), *cert. denied*, —— U.S. ——, 102 S.Ct. 515 (1981), or *Heagney* v. *University of Washington*, 642 F.2d 1157 (9th Cir. 1981), at any time alleged that those defendants employed education or other facially neutral requirements in their hiring or promotion practices. All four cases involved general allegations of discriminatory hiring or promotion when the employer's subjectivity gave rise to an inference of racial or gender-based animus. Objective employment practices, such as those at issue in the instant case, were simply not present in these cases, and the cases were appropriately decided based on the theory of discriminatory treatment set out in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977). *See, e.g., Heagney* v. *University of Washington, supra*, 642 F.2d at 1163.

II. THE FIFTH CIRCUIT CORRECTLY RECOGNIZED THAT THE BURDENS OF PROOF IN DISPARATE IMPACT CASES REMAIN UNAFFECTED BY *BURDINE*.

A. The Distribution of Burdens of Proof in *Albemarle Paper* Remains Vital to the Proper Evaluation of Disparate Impact Claims.

The allocation of burdens of proof and persuasion in disparate impact cases enunciated by this Court in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975), remains vital to the proper evaluation of such claims. Under that distribution of burdens, once plaintiffs have established a *prima facie* case that a facially objective employment practice impacts disproportionately on a particular employee group, the burden is on the defendant to rebut that showing with evidence of the validity of an educational requirement, *see Griggs* v. *Duke Power*, *supra*, 401 U.S. at 432, or some other manifest relationship to the employment practice in question. *See*

Dothard v. *Rawlinson*, *supra*, 433 U.S. at 425-26; *New York City Transit Authority* v. *Beazer*, 440 U.S. 568, 589-592 (1979). The burden of persuasion, however, remains with the plaintiff, for he or she must rebut defendant's proof either with additional evidence that there exists no legitimate business necessity for the challenged practice, or that less objectionable alternatives could be substituted for the defendant's discriminatory employment activity. *Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 426.

The distinction between the assignment of burdens in disparate impact and disparate treatment cases was explicitly affirmed last term in *Texas Department of Community Affairs* v. *Burdine*, *supra*, 450 U.S. 248. In that case, the Court reiterated that "the factual issues, and therefore the character of the evidence presented, differ when the plaintiff claims that a facially neutral employment policy has a discriminatory impact on protected classes." *Id.* at 252 n.5. The Fifth Circuit relied on just this distinction when it affirmed its previous decision after reconsideration in light of *Burdine* (Pet. App. A-4). The Fifth Circuit did not "ignore" this Court's instruction as defendant claims (Pet. at 9) but applied the well established law for disparate impact cases.

Defendant employers are clearly the proper parties to come forward with evidence of the job-relatedness of an educational or other objective employment requirement. The employer is in the best position to recognize the specific skills and talents required by a particular job, and is perhaps the only party with knowledge of the attribute that a given educational test or requirement is intended to reveal. To place the burden of showing the absence of job-relatedness on the plaintiff would require that the employee have intimate knowledge of a job without first having any work experience at that position, and of the basis for educational requirements

designed and adopted by the employer. The burden of showing legitimate business purposes for such employment criteria clearly should remain with the party having superior knowledge of the circumstances giving rise to the employment practice, i.e., the employer.

B. The Third Circuit's Decision in *NAACP* v. *Medical Center, Inc.*, Did Not Disturb the Burdens of the Parties Set Out in *Albemarle Paper*.

Petitioner incorrectly cites the decision of the Third Circuit, *en banc* in *NAACP* v. *Medical Center, Inc.*, 657 F.2d 1322 (3d Cir. 1981), for the proposition that *Burdine* is applicable to Title VII cases involving claims of disparate impact. In fact, that decision expressly affirms the distribution of burdens of proof in disparate impact cases enunciated in *Johnson*. In *NAACP* v. *Medical Center*, the district court had analyzed plaintiffs' Title VI claims under the three step process set out in *Albemarle Paper*, and found that they had failed to establish a *prima facie* showing of any disparate impact created by the defendant's hospital reorganization scheme. However, assuming *arguendo* that such a showing had been made, the court further found that the defendant had successfully proved a legitimate business need for the plan challenged by the plaintiffs, and that plaintiffs had failed to show the availability of less objectionable alternative plans. *Id.* at 1326.

On appeal, plaintiffs alleged that the district court erred in holding that plaintiffs were required to show that a less discriminatory alternative was available. The Court of Appeals, however, rejected this contention, stating: "[t]he contention plaintiffs make here, that business relatedness constitutes an affirmative defense, is incompatible with the third step of *Albemarle*. Plaintiffs would have [defendant] bear the burden of persuasion on this issue *by showing a dearth of less objectionable alternatives*." Id. at 1335 (emphasis supplied). Such a shift of

the evidentiary burdens set out in *Albemarle Paper* would indeed impose an excessive burden on defendants in impact cases, for as the Third Circuit correctly noted, " 'it would place on the [defendant] at the second stage the burden of showing that the reason . . . was not a pretext, rather than requiring such proof from the [plaintiff] as a part of the third step.' *Board of Trustees of Keene State College* v. *Sweeney*, *supra*, 439 U.S. at 24-25 n.1." *Id.* at 1335. The Third Circuit's rejection of plaintiffs' argument in no way diminished the distinction between the respective burdens of proof in cases of disparate impact and disparate treatment. After plaintiff make a *prima facie* showing of disparate impact, defendant still must prove that there is a business necessity for the job requirements imposed, *see Griggs* v. *Duke Power Co.*, *supra*, 401 U.S. at 432, and that tests or other employment standards are valid. *Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 425. The Third Circuit held as much by affirming the district court's imposition of those burdens on the defendant in *NAACP* v. *Medical Center*.[1] That case is in complete accord with the Fifth Circuit's holding in *Johnson*.

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[1] In so doing, the Third Circuit followed the consistent line of its previous decisions in *Whack* v. *Peabody Wind En'g Co.*, 595 F.2d 190 (3d Cir. 1979) and *EEOC* v. *Greyhound Lines, Inc.*, 635 F.2d 188 (3d Cir. 1980), both cases in which the burden of proving job-relatedness of employment criteria rested with the defendants. Significantly, the court in *Whack* cited with approval the Fifth Circuit's decision in *Rowe* v. *General Motors Corp.*, 457 F.2d 348 (5th Cir. 1972), a disparate impact case involving charges very similar to those of the instant case, and relied on by the *Johnson* court in its remand to the district court. 595 F.2d at 194 n.15.

CONCLUSION

Plaintiffs originally filed this case in 1974, and still await resolution by the District Court of key factual issues as to both the discriminatory impact and the validity of defendant's employment and promotion requirements. The remand of this case to the district court by the Fifth Circuit should be effectuated promptly, and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Petitioner's Reply Brief

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Respondents.

PETITIONER'S REPLY TO BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the disparate impact theory of employment discrimination is (a) applicable to claims of classwide discrimination based on generalized-nonspecified employment practices or alleged subjective criteria or (b) limited to challenges to specifically elucidated objective, facially neutral practices, such as tests or physical requirements?

2. Whether the Court below erred (a) in holding the United States Supreme Court's decision in *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981), that the burden of persuasion remains at all times with the plaintiff, inapplicable to a disparate impact case and (b) in requiring the defendant to "prove" legitimate, nondiscriminatory reasons by a preponderance of the evidence?

3. Whether the Court below erred in concluding that the burden of proof shifts if a plaintiff does not more than produce general evidence of a higher percentage of blacks in the lower levels of a defendant's workforce than in the higher levels, without specific statistical proof of "gross" disparity between persons qualified for promotion and those promoted during the relevant time frame?

4. Whether the Court below erred in holding that comparisons of a defendant's workforce to the external labor market are irrelevant in determining whether the defendant discriminates against blacks with respect to promotions?

5. Whether the Court below erred in holding that the District Court adopted and applied an erroneous notion of controlling legal principles regarding the use and role of statistics in an employment discrimination case?

6. Recognizing that the instant case is primarily a Section 1981 action, whether the Court below erred in holding that the case should be analyzed under disparate impact principles and that the class plaintiffs need not prove intentional discrimination?

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No. 81-2026

IN THE

Supreme Court of The United States

OCTOBER TERM, 1981

UNCLE BEN'S, INC.,

Petitioner,

v.

THOMAS JOHNSON, Individually and on Behalf of All Others Similarly Situated,

Respondents.

PETITIONER'S REPLY TO BRIEF FOR THE RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PRELIMINARY STATEMENT

On April 30, 1982, Uncle Ben's, Inc. (hereinafter "Petitioner" or "Uncle Ben's"), filed its Petition for a Writ of Certiorari seeking review of the judgment of the United States Court of Appeals for the Fifth Circuit in *Johnson* v. *Uncle Ben's, Inc.*, 657 F.2d 750 (5th Cir. 1981). On June 21, 1982, Respondents filed a Brief for the Respondents in Opposition to the Petition.[1]

Pursuant to Rule 28.5 of the Rules of the Supreme Court of the United States, Uncle Ben's hereby files its Reply to the Brief in Opposition. Additionally, in light of this Court's subsequent decision in *General Contractors Association, Inc.* v. *Pennsylvania,* 50 U.S.L.W. 4975 (U.S. June 29, 1982), Petitioner, as authorized by Rule 28.6, elaborates on its position in footnote 25 of the Petition that this is primarily a Section 1981 action, for which intent must be shown.

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[1] Respondents have not addressed, and apparently do not disagree with, Petitioner's position that the writ of certiorari should be granted so that this Court may address the significant issues raised by the Court of Appeals' decision as to the role of statistics in Title VII cases. *See* Petition for Certiorari, pp. 24-29.

REASONS FOR GRANTING THE WRIT

I. RESPONDENT'S STATISTICAL PROOF PRIMARILY IS DIRECTED TO CLAIMS UNDER 42 U.S.C. §1981. IN LIGHT OF THIS COURT'S RECENT DECISION IN *GENERAL CONTRACTORS ASSOCIATION, INC.* v. *PENNSYLVANIA*, THE FIFTH CIRCUIT ERRED IN HOLDING THAT THIS CASE SHOULD BE ANALYZED UNDER DISPARATE IMPACT PRINCIPLES AND THAT INTENT IS NOT REQUIRED.

This suit was filed initially under 42 U.S.C. §1981 ("Section 1981"). The pretrial order stated the issue in terms of determining discrimination from and after March 28, 1972.[2]

The Title VII allegations were not added until September 12, 1975. Respondent's EEOC Charge, on which the Title VII allegations were based, was filed February 19, 1974. The relevant time frame under Title VII therefore commenced on August 19, 1973, i.e., 180 days prior to the filing of the underlying EEOC Charge. *United Airlines* v. *Evans*, 431 U.S. 553 (1977).

With respect to allegations of discrimination against blacks in promotion or "upward mobility," Respondents presented no statistical analysis which extended beyond May 1974. Thus, Respondents' statistical proof with respect to the Title VII allegations covered *only* the period from August 19, 1973 to May 1974. The period March 28, 1972 to August 19, 1973 is covered *only* by Section 1981.

Ignoring the fact that Respondents' statistical evidence is directed to a period of time covered *primarily* by Section 1981 alone, the Court of Appeals held that the instant case is to be analyzed under disparate impact principles and "the class plaintiffs do not need to prove knowing and intentional discrimination . . ." (App. C-6).

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[2] This time frame limitation under Section 1981 is consistent with *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974), wherein the Fifth Circuit held that a Section 1981 claim is governed by the Texas two-year statute of limitations.

The holding that Respondents need not prove intentional discrimination, to the extent it addresses Section 1981 claims, is contrary to *General Building Contractors Association, Inc.* v. *Pennsylvania*, 50 U.S.L.W. 4975 (U.S. June 29, 1982), wherein this Court held that Section 1981 can only by violated by purposeful discrimination.

The writ of certiorari should be granted so that this Court may remedy the error committed by the Fifth Circuit in allowing the class plaintiffs to prevail on the claims under Section 1981 without the "need to prove knowing and intentional discrimination . . ." (App. C-6). Moreover, since Respondents' Title VII claims are properly claims of *discriminatory treatment*, purposeful discrimination must also be shown under Title VII (Petition for a Writ of Certiorari, pp. 10-18).

II. THE FIFTH CIRCUIT ERRED IN REMANDING THE CASE TO THE DISTRICT COURT FOR FURTHER DETERMINATIONS UNDER A THEORY OF DISPARATE IMPACT.

A. The Instant Case Does not Attack a Specific, Objective Employment Practice — "Educational Requirements" — and Therefore Cannot Properly be Assessed Under Disparate Impact Principles.

Respondents acknowledge that a case attacking general employment policies or alleged subjective criteria and not identifying specific *objective* standards is properly analyzed under the theory of discriminatory treatment. (Brief for Respondents in Opposition, p.7). Respondents do not take issue with the statement in Uncle Ben's Petition for a Writ of Certiorari that the instant case was brought, tried, and decided on a *discriminatory treatment* theory.

Respondents claim, however, that Uncle Ben's "promotion system. . . relie[es] on an education requirement for promotion to upper level positions" (Brief for the Respondents in Opposition, p. 4). Notwithstanding the apparent acknowledgment that the instant case was *brought, tried,* and *decided* under a discriminatory treatment theory, Respondents assert that a *disparate impact* theory flows from

alleged "educational requirements" and that the Fifth Circuit's holding that the instant case must be analyzed under disparate impact principles thus does not conflict with decisions cited in the Petition for a Writ of Certiorari (Brief for the Respondents in Opposition, p. 5-6).

Respondents' assertions are untenable. *Respondents did not contend at trial, nor did they offer any evidence, that Uncle Ben's has "educational requirements."* Not until the instant case was appealed to the Fifth Circuit did Respondents advance the *erroneous* assertion that Uncle Ben's requires "specific degrees and formal courses of study." [3]

While Respondents at trial introduced statistical data in an effort to show that blacks suffered limited "upward mobility," such limitations were never ascribed to any particular employment practice, much less to any alleged "educational requirement." Accordingly, no effort was made by Respondents to establish a causal connection between the alleged statistical disparities and any alleged "educational" requirements.

As recognized by the Fifth Circuit in *Pouncy* v. *Prudential Insurance Company of America*, 668 F.2d 795 (5th Cir. 1982) (App. H-11-14), absent proof of a *causal connection* between a specific practice and statistical disparities, the disparate impact model is not applicable:

> Although some courts have used the disparate impact model of proof to challenge multiple employment practices simultaneously. . . this is an incorrect use of the model. The disparate impact model applies only when an employer has instituted a specific procedure, usually a selection criterion for employment, that can be shown to have a *causal* connection to a class based imbalance in the

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[3] Respondents' assertion on appeal was not based on any Record testimony. Respondents erroneously relied on a statement by *Petitioner's Counsel*, taken out of context, as the testimony of one of Petitioner's "witnesses" that Uncle Ben's requires "specific degrees."

Although *Petitioner's* expert witness, Dr. Jeannerett, identified certain kinds of knowledge required for particular jobs, i.e. chemistry and math, typically but not necessarily obtained in an educational environment, he *explicitly testified that Uncle Ben's has no "educational requirements."*

workforce. Thus, a disparate impact analysis may be used to challenge aptitude and intelligence tests . . . education requirements. . . height and weight requirements, . . ., an employer's refusal to employ persons who use methadone, who have a poor credit rating. . . or who have a record of arrests. . . *so long as resulting disparate impact is shown.*

* * *

None of these . . . "employment practices" singled out by the appellant — the failure to post job openings, the use of a level system, and evaluating employees with subjective criteria — are akin to the "facially neutral employment practices the disparate impact model was designed to test.

* * *

Moreover, the appellant cannot make a showing that the . . . employment practices he has identified have caused the racial imbalance in Prudential's work force. *The disparate impact model requires proof of a causal connection between a challenged employment practice and the composition of the work force.*

* * *

Pouncy has not shown, nor can he show, that independent of other factors the employment practices he challenges have caused the racial imbalance in Prudential's work force. . . . Absent proof that the disparate impact is caused by one or more of the challenged employment practices, we do not require the employer to justify any (or all) employment practices. In sum, the nature of the evidence presented by appellant at trial could not establish a prima facie case . . . based on the disparate impact model.

Likewise, in the instant case, because Respondents made no effort at trial to demonstrate a causal connection between any "educational requirements" and the alleged disparities, they obviously could not have established a *prima facie* case based on the "impact" model.

The allegations and evidence before the district court are indistinguishable from the allegations in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 229 (1977), and decisions in other Circuits which hold that such allegations must be analyzed under the *discriminatory treatment* theory. Since Respondents acknowledge that generalized allegations of discrimination or "excess subjectivity"

are properly analyzed under the *discriminatory treatment* theory in *Teamsters*, it is without question that the Fifth Circuit's contrary holding in the instant case should be reversed.

B. In a Decision Rendered Subsequent to *Pouncy* v. *Prudential Insurance Company of America* and Published Subsequent to the Filing of the Petition for a Writ of Certiorari, a Different Fifth Circuit Panel, Ignoring *Pouncy*, and in Accord with the Instant Case, Analyzed Generalized Allegations of Discrimination and Allegations of "Excess Subjectivity" Under Disparate Impact Principles.

As noted in the Petition for Certiorari, a *different* panel of the Fifth Circuit in a decision rendered *subsequent* to *Johnson* v. *Uncle Ben's* held, contrary to *Johnson*, that the disparate impact theory "is not . . . the appropriate vehicle from which to launch a wide ranging attack on the cumulative effect of a Company's employment practices." *Pouncy* v. *Prudential Insurance Company of America*, *supra* (App. H-11). The *Pouncy* panel, again contrary to *Johnson*, further recognized that a challenge to subjective evaluations is not "akin to 'facially neutral employment practices' the disparate impact model was designed to test" (App. H-13).

Despite the statements in *Pouncy*, a *subsequent* and *different* panel of the Fifth Circuit improperly forced a discriminatory treatment case into the disparate impact model. *Harrell* v. *Northern Electric Co.*, 672 F.2d 444 (5th Cir. 1982). Harrell advanced *generalized* allegations of discrimination in hiring and presented statistical evidence allegedly establishing that the percentage of black applicants was significantly greater than the percentage of black hires. The evidence showed that defendant "used all white personnel to *subjectively* determine whether black applicants . . . were qualified." Had this case been presented to the *Pouncy* panel, it clearly would have been assessed under *discriminatory treatment* principles. For no other apparent reason than that the case was heard by a *different* panel, the case was treated as one of *disparate impact*.

The *Johnson* - *Pouncy* - *Harrell* decisions graphically illustrate the confusion within the Fifth Circuit as to the appropriate theory —

discriminatory treatment vs. disparate impact — to be applied to generalized allegations of discrimination and allegations of subjective criteria. These decisions pose a serious dilemma for the district courts and litigants in the Fifth Circuit: Not until a particular case is decided on appeal will the court and the parties be certain as to the "appropriate" theory of analysis, and which theory — impact or treatment — is deemed "appropriate" apparently will depend entirely on the particular panel "drawn" for the particular case. *Harrell* highlights the necessity that this Court resolve the issue as to which theory of discrimination is to be applied to generalized allegations of discrimination and allegations of "excess subjectivity."

III. THE FIFTH CIRCUIT'S HOLDING THAT *BURDINE'S* ALLOCATIONS OF THE BURDENS OF PRODUCTION AND PERSUASION IS NOT APPLICABLE TO CASES OF DISPARATE IMPACT CONFLICTS WITH DECISIONS OF THE THIRD CIRCUIT.

A. The Fifth Circuit's Holding that Petitioner Must Prove the Existence of Legitimate, Nondiscriminatory Reasons by a Preponderance of the Evidence Improperly Shifts the Burden of Persuasion to Petitioner.

In *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981), this Court reversed the Fifth Circuit's holding that when a plaintiff in a discriminatory treatment case establishes a *prima facie* case, the defendant must then "prove by a preponderance of the evidence" that legitimate nondiscriminatory reasons exist to explain the challenged decision. The Court recognized that "[i]t is plain that the Court of Appeals required much more: It placed on the Defendant the burden of persuading the Court that it had convincing, objective reasons for preferring the chosen applicant above the Plaintiff."

Burdine makes clear that to say the defendant must "prove by a preponderance of the evidence" legitimate, nondiscriminatory reasons improperly and erroneously requires the defendant to bear the burden of persuasion. Although Respondents assert that the Fifth Circuit's

holding in this case does not shift the burden of persuasion to Petitioner (Brief for the Respondents in Opposition, p. 8), the explicit language of the Court of Appeals decisions defeats this assertion.

Specifically, in its decision on rehearing, the Court of Appeals defined Defendant's burden exactly as it did in *Burdine*:

> The District Court correctly determined that Plaintiffs' statistical evidence and testimonial evidence made out a prima facie showing of discrimination against blacks on the promotion issue. . . . Uncle Ben's then had the " '*onus of going forward with the evidence and the burden of persuasion,*' " . . . *as to either the existence of "legitimate, nondiscriminatory reasons for [its] action by a preponderance of the evidence,*" . . . *or the total unacceptability of Plaintiffs' statistical proof*. . . .

(App. C-10, 11) (emphasis supplied).

On remand from this Court in light of *Burdine*, the Court determined that its prior holding that Uncle Ben's has the "burden of persuasion" would stand because "respective burdens in a disparate impact case are . . . unaltered by *Burdine*" (App. A-5). According to the Court, "post-*Burdine* decisions for the Second and Tenth Circuits have not altered the rule *which shifts the burden of persuasion to the Defendant in disparate impact cases under Title VII*" (App. A-5, 6, n.3) (emphasis supplied).

Because even Respondents apparently recognize that in "impact," as well as "treatment" cases, the burden of persuasion remains with the plaintiff (Brief for the Respondents in Opposition, p. 8), there is no question that the Fifth Circuit's contrary holding should be reversed.

B. The Fifth Circuit's Holding that the Burden of Persuasion Shifts to the Defendant in a Disparate Impact Case is Contrary to Decisions in the Third Circuit.

Respondents assert that the Third Circuit's Decision in *NAACP* v. *Medical Center, Inc.*, 657 F.2d 1322 (3rd. Cir. 1981), does not conflict with the Fifth Circuit's holding in the instant case (Brief for the Respondents in Opposition, p. 9). The Fifth Circuit obviously does not agree with Respondents' assertion. Specifically, in its decision on

remand, the Fifth Circuit cites *NAACP* v. *Medical Center, Inc., supra,* as contrary to its holding that in a disparate impact case the burden of persuasion shifts to the defendant (App. A-6) ("But cf NAACP v. Medical Center, Inc., ... F.2d ..... at No. 80-1893, slip op. at 22-27) (3rd Cir. June 19, 1981) (en banc) (*Burdine* affects allocation of proof in disparate impact case under Title VI)").

Respondents do not address *Croker* v. *Boeing Co.*, 662 F.2d 975, 991 (3rd Cir. 1982), also cited in the Petition for Certiorari, which also held, contrary to the Fifth Circuit, that in a disparate impact case, "as with claims of discriminatory intent, the burden of persuasion remains at all times with the plaintiff. *Thus, the defendant need only come forward with evidence to meet the inference of discrimination raised by the prima facie case.*"

The foregoing language squarely defeats Respondents' assertion that the Third Circuit is in accord with the holding in *Johnson* that in "impact" cases the burden of persuasion shifts to the defendant.

The instant decision is merely one of a line of cases in which the Fifth Circuit has endeavored to limit significantly the application of *Burdine*. *Johnson* v. *Uncle Ben's Inc.*, holds *Burdine's* allocation of the burdens of production and persuasion inapplicable to cases of disparate impact. In *Williams* v. *New Orleans Steamship Association*, 673 F.2d 742 (5th Cir. 1982), the court held that in class actions requiring purposeful discrimination, the burden of the defendant to rebut plaintiff's case by providing a "nondiscriminatory explanation for the apparently discriminatory results . . . is more onerous than the rebuttal burden required of defendant in individual Title VII claims under . . . *Burdine.*" 673 F.2d at 750 & n.14. Finally, in *Payne* v. *Travenol Laboratories, Inc.*, 673 F.2d 798, 818 (5th Cir. 1982), the Court held *Burdine* inapplicable to *discriminatory treatment* class actions. Together, *Johnson, Williams,* and *Payne* serve to restrict the application of *Burdine* to single-plaintiff cases brought pursuant to the theory of discriminatory treatment.

The writ of certiorari should be granted so that this Court may thwart the Fifth Circuit's efforts to all but eradicate the allocation of the burdens of production and persuasion set forth in *Burdine.*

IV. THE COURT OF APPEALS ERRED IN FAILING TO APPLY THE CLEARLY ERRONEOUS STANDARD OF FEDERAL RULE OF CIVIL PROCEDURE 52(a).

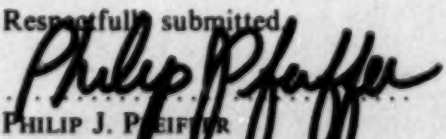
In its initial decision, the Court of Appeals stated that "the district court's findings regarding the lack of discrimination in promotion of blacks ... are not clearly erroneous" (App. D-2). On rehearing, however, the Court determined it was not bound by the "clearly erroneous" standard because the statement by the district court (from the bench) constituted "an erroneous notion of controlling legal principles regarding the role of statistics" (App. C-5). The Fifth Circuit concluded that the district court erred in assessing Respondents' claims of promotion discrimination under the discriminatory treatment theory and by requiring proof of intent.

Respondents' belated and erroneous reliance on nonexistent "educational requirements" notwithstanding, Respondent's allegations and proof are of *discriminatory treatment* claims, and proof of intent is required. Moreover, this case is primarily a Section 1981 case and proof of intent likewise is required. The reason relied upon by the Fifth Circuit to disregard the clearly erroneous rule — that the case must be analyzed under the *disparate impact* theory — is itself "clearly erroneous." Since the Court of Appeals originally recognized that when judged under the clearly erroneous standard, the district court's findings and conclusions cannot be disturbed, it is clear that the Court of Appeals' decision should not only be vacated, but also that the Court of Appeals should be instructed to affirm the decision of the district court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Philip J. Pfeiffer, attorney for Petitioner Uncle Ben's, Inc., do hereby certify that on this 25th day of August, 1982, three copies of the foregoing Reply to Respondents' Brief in Opposition to Petition for a Writ of Certiorari were mailed to the following counsel of record for Respondents in this proceeding:

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